

# Florida Rule of Criminal Procedure 3.850: A Monograph<sup>1</sup>

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## I. Introduction to the Rule

It was August, 1963, and readers of the *Panama City News* or the *Panama City Herald* could scarcely help but feel a sense of civic pride. The front pages told of a local construction boom: A Howard Johnson's Motor Lodge on West U.S. 98, Gainer Funeral Home's building on North Cove Boulevard, and the Florida State Employment Office's new quarters on Ninth and Magnolia. In the advertising supplements the Cook Motor Company trumpeted the sporty new Ford Falcon for \$1,795. And on the sports pages, big things were foretold for the Bay High School Tornadoes and junior halfback Joe Wayne Walker.

It was August, 1963, and Panama City, Florida, was small-town Dixie, an unlikely epicenter for a constitutional earthquake.

That same month, while the Tornadoes ran their two-a-day drills, Clarence Earl Gideon was tried for the second time – this time *with* the assistance of counsel – for the theft of 12 bottles of Coca-Cola, 12 cans of beer, four fifths of whiskey and about \$65 in change from the cigarette machine and jukebox of the Bay Harbor Pool Hall. Neither the trial nor Gideon's acquittal received any particular notice in the *Panama City News* or the *Panama City Herald*.

But in the highest echelons of Florida government, notice was taken. In light of the Supreme Court's decision in *Gideon v. Wainwright* and Gideon's ensuing acquittal on retrial it was expected that hundreds, perhaps thousands of Florida prisoners would be filing *habeas corpus* petitions claiming that their judgments and sentences were unconstitutional because uncounseled. The respondent in each such petition would be Louie Wainwright, the warden of the state penitentiary at Raiford. Jurisdiction would lie in the circuit court of what was then

Bradford County, a rural spot in the middle of the state that in 1963 had but one circuit judge; one judge, and hundreds, perhaps thousands of petitions. Chaos would ensue.

Thus it was that as a result of *Gideon v. Wainwright* the State of Florida got what it had never had before: a rule of criminal procedure, aptly entitled Florida Rule of Criminal Procedure No. 1. The rule provided that *habeas* petitions were to be filed in the circuit court in which the convictions under attack had been had. The expected flood of petitions would be fairly and evenly distributed throughout the state. Chaos would be neatly averted.

In due course the number of rules of criminal procedure trebled, and Rule 1 became Rule 3. There are still Florida lawyers and judges who refer to all post-conviction claims as “Rule 3’s.”

Joe Wayne Walker and the 1963 Bay High Tornadoes never really got the chance to live up to expectations. The big game against the Rutherford High Rams was played on the evening of Friday, November 22, and ended in a scoreless tie. But President Kennedy had been assassinated earlier that day, and the football game didn’t seem so important.<sup>2</sup>

Although the writ of habeas corpus was routinely referred to at common law as “the great writ,” its use in collateral attacks upon criminal judgments and sentences was relatively uncommon. An American treatise on habeas from 1858<sup>3</sup> cautions that proceedings must be not merely “irregular” but flatly illegal for habeas to provide post-conviction relief. By way of

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<sup>2</sup> Adapted from Milton Hirsch, *Small-Town Florida 1963: Time It Was and What a Time It Was*, Champion, Jan./Feb. 2003, at 42. The Florida Supreme Court “adopted Rule of Criminal Procedure 1 on April 1, 1963, *In re Criminal Procedure Rule 1*, 151 So. 2d 634 (Fla. 1963), only fourteen days after *Gideon* was rendered.” *Graham v. State*, 372 So. 2d 1363 (Fla. 1979). For a more scholarly and particularized history of the rule, see *Baker v. State*, 878 So. 2d 1236, 1239 *et. seq.* (Fla. 2004); *Austin v. State*, 160 So. 2d 730 (Fla. 1964); *Bryant v. State*, 102 So. 3d 660 (Fla. 2d DCA 2012) (Altenbernd, J.).

<sup>3</sup> Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus* (Albany 1858).

example, “[w]here . . . a justice of the peace having power to fine, or imprison for a limited time, adjudged the defendant to pay a fine and stand committed until paid, the judgment was held void. The imprisonment, being indefinite, was beyond the jurisdiction of the justice.”<sup>4</sup> And even in these instances, habeas relief was sometimes sought from a court having appellate jurisdiction, rather than the court responsible for the allegedly illegal confinement.

*Gideon* changed everything. Rule 3.850 is habeas’s statutory successor, but its successor for a single purpose: a collateral attack on a criminal judgment or sentence, the attack being made in the court that imposed the judgment or sentence. These attacks are now a commonplace. Indeed they are a growth industry. At the time *Gideon* was decided, Florida’s prison population was in slight excess of 7,000. Today it is more than ten times that much – not counting local jail populations, and not counting 150,000 offenders on some form of probation.

## II. Pleading a facially sufficient claim

### A. In general

In keeping with modern pleading practice, Fla. R. Crim. P. 3.020 provides that the Rules of Criminal Procedure are to “be construed to secure simplicity in procedure and fairness in administration.” Gone are the days when “the precise word was the sovereign talisman, and every slip was fatal.”<sup>5</sup>

In this as in so many ways, post-conviction procedure provides the exception to the general rule. A claim for relief under Rule 3.850 must be pleaded in strict conformity with the

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<sup>4</sup> *Id.* at 334, citing *Howard v. People*, 3 Mich. 207.

<sup>5</sup> *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (N.Y. 1917) (Cardozo, J.).

Rule’s labyrinthine requirements. “[A]nd every slip [i]s fatal.”<sup>6</sup>

To assist the pleader in navigating the labyrinth, and because so many post-conviction claims are filed by *pro se* litigants, Fla. R. Crim. P. 3.987 provides a form motion for post-conviction relief. The existence of the form motion notwithstanding, the intricacies of Rule 3.850 continue to prove a trap for the unwary.<sup>7</sup>

### 1. The oath requirement

Rule 3.987 tells the would-be post-conviction movant not once, but several times, that his motion must be truthful and factual, on pain of various consequences. Paragraph one of the rule includes the warning that, “Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.”<sup>8</sup> Paragraph seven cautions that the motion “must include

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<sup>6</sup> See Fla. Stat. § 924.051(2) (“the provisions for collateral review created in this chapter may only be implemented in strict accordance with the terms and conditions of this section”). *But see infra* at A. 2. (re-pleading technical defects).

<sup>7</sup> In an effort to render the would-be post-conviction claimant less unwary of the pitfalls that lie ahead, and more aware of the wisdom of Oscar Wilde’s admonition to “be careful what you wish for, you may get it,” some Florida judges inform every post-conviction petitioner, in writing or in open court, that if his motion is granted and his judgment and sentence vacated, his case will almost certainly be re-set for trial; that the prosecution will not be bound, in connection with retrial, by any prior plea offers, nor obliged to extend any plea offer at all; and that in the event of conviction he could receive a harsher sentence than the one he presently undergoes. Provided this advisement is not done in such a manner as to threaten or coerce the movant, it is unobjectionable. Arguably it is a service to the movant (particularly a *pro se* movant), who may not be aware that he may have as much to lose as he has to gain by pursuing his post-conviction claim. *See, e.g., White v. State*, 298 So. 3d 694 (Fla. 2d DCA 2020). *See also Rubright v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 2d DCA Dec. 7, 2022); *id.* at \_\_\_, n. 6 (Lucas, J., concurring).

<sup>8</sup> Fla. R. Crim. P. 3.987(1).

an oath, under penalties of perjury, that the movant has read the motion or had it read to him,<sup>9</sup> that the movant understands the contents of the motion,<sup>10</sup> and that all of the facts stated in the motion are true and correct.<sup>11</sup> The movant “must also certify, under the threat of sanctions, . . . that the motion is being filed in good faith and with a reasonable belief that it is timely filed,”<sup>12</sup> “that the motion has potential merit,”<sup>13</sup> that the motion is not duplicative of previous motions,<sup>14</sup> and that the movant understands English, or if he does not understand English, has had the motion accurately and completely translated to him.<sup>15</sup> The movant must sign an oath providing that, “Under penalties of perjury, I declare that I have read the foregoing motion, or had it read to me, that I understand the motion’s content, and that all of the facts alleged in the motion are true and correct.”<sup>16</sup>

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<sup>9</sup> *Id.* at (7)(a)

<sup>10</sup> *Id.* at (7)(b)

<sup>11</sup> *Id.* at (7)(c)

<sup>12</sup> *Id.* at (8)(a); *see also* Rule 3.850(n), (n)(1).

<sup>13</sup> *Id.* at (8)(b); *see also* Rule 3.850(n), (n)(1).

<sup>14</sup> *Id.* at (8)( c); *see also* Rule 3.850(n), (n)(1).

<sup>15</sup> *Id.* at (8)(d); *see also* Rule 3.850(n)(2).

<sup>16</sup> Fla. R. Crim. P. 3.987. The movant must also sign a “Certifications and Acknowledgment” in which he represents that the motion is filed in good faith, and that he has a reasonable belief that the motion is timely, has potential merit, and does not duplicate previous motions. He must also certify that he read and understood the motion in English, or had it read to him in his language of choice and was understood by him. Finally, he must represent that he “understand[s] that I am subject to judicial or administrative sanctions, including but not limited to forfeiture of gain time, if this motion is found to be frivolous, malicious, made in bad faith or with reckless disregard for the truth, or an abuse of the legal process.” *See also* Fla. R. Crim. P.

Florida courts never tire of repeating that any departure from the demised language – an assertion that the facts alleged are true “to the best of my knowledge and belief,” for example – is fatally defective.<sup>17</sup> The particular language of the jurat is for the express purpose of subjecting the movant/affiant to the penalty of perjury for false allegations.<sup>18</sup>

The basis for the post-conviction claim in *Gorham v. State*<sup>19</sup> was the alleged failure of the prosecution properly to disclose to the defense exculpatory material pursuant to *Brady v. Maryland*<sup>20</sup> and progeny. It was not until Gorham was convicted and serving time that “the discovery of this [*Brady*] evidence was accomplished through investigations undertaken by his counsel.”<sup>21</sup> In making his post-conviction claim, Gorham took the position that this sequence of events entitled him to allege that the facts upon which he was relying were true “to the best of his

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3.850(n)(4).

<sup>17</sup> *Scott v. State*, 464 So. 2d 1171, 1172 (Fla. 1985). “Using this qualifying language” – *i.e.*, “to the best of my knowledge and belief” – “a defendant could file a motion for post-conviction relief based upon a false allegation of fact without fear of conviction for perjury. If [an] allegation proved to be false the defendant would be able to simply respond that ...he did not know that the allegation was false.”

<sup>18</sup> Thus the language of the oath required by Rule 3.850, and the rationale for that particular language, are identical to the language of and rationale for the oath required by Rule 3.190(c)(4) dealing with sworn motions to dismiss. *State v. Rodriguez*, 523 So. 2d 1141 (Fla. 1988). In both instances, the affiant cannot move for his relief of choice without squarely subjecting himself to the penalty of perjury for false averments.

<sup>19</sup> 494 So. 2d 211 (Fla. 1986).

<sup>20</sup> 373 U.S. 83 (1963). Regarding claims brought pursuant to Rule 3.850 for failure to comply with *Brady* obligations, *see infra* at VI C.

<sup>21</sup> *Gorham*, 494 So. 2d at 212.

knowledge and belief.” While he was behind bars, Gorham learned by hearsay (from his attorney) that his attorney had learned by hearsay (presumably from an investigator) that undivulged *Brady* material existed. Gorham was a percipient witness to none of this. How could he, in compliance with Rule 3.987, swear (according to the then-required language of the rule) that he “ha[d] personal knowledge of the facts and matters” asserted in his post-conviction claim, and that based upon his personal knowledge “all of these facts and matters are true and correct”?

This argument has a reasonable feel to it; but the Florida Supreme Court rejected it:

It is Gorham’s literal definition of “personal knowledge” which is the source of confusion here. We did not mean in *Scott* [v. *State*, 464 So.2d 1171 (1985)] that the oath’s requirement of personal knowledge is synonymous with “firsthand” knowledge. Such a fatuous interpretation would eviscerate Rule 3.850 and would truly elevate form over substance.

... [A] defendant may review the information contained in a motion for post-conviction relief which was discovered by his counsel’s investigations, and the defendant therefore would be in the same position as his counsel and able to meet the “personal knowledge” requirement of the Rule 3.987 oath. It is with this understanding that our holding in *Scott* must be assessed.<sup>22</sup>

Whether Gorham’s reading of the rule was in truth “fatuous” is a nice question. In *Henegar v. State*,<sup>23</sup> the jurat submitted and signed by the movant in support of his post-conviction application read as follows:

BEFORE ME, the undersigned authority, this day personally

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<sup>22</sup> *Id.* See also *Freeman v. State*, 629 So. 2d 276 (Fla. 2d DCA 1993).

<sup>23</sup> 635 So. 2d 990, 990 (Fla. 1st DCA 1994).

appeared Ronnie A. Henegar, who first being duly sworn, says that he is the Defendant in the above styled cause, that he has read the foregoing Motion for Post Conviction Relief, and has personal knowledge of the facts and matters set forth therein and alleged, or that matters of which he does not have personal knowledge are contained in the trial court file thereof, and that each and all of these facts and matters are true and correct.

Rejecting the trial court's determination that the foregoing oath was insufficient, the appellate court concluded:

This verification is clearly not identical to those found inadequate in *Scott* and *Gorham* in that it does not contain the "to the best of his knowledge" qualification. Instead, what obviously concerned the trial court was the phrase "or that matters of which he does not have personal knowledge." That language, however, does not raise a concern about Henegar's use of false allegations; rather, the language only reflects the same insecurity on Henegar's part regarding the need for first-hand knowledge as was reflected in Gorham's argument. Applying the analysis used in *Gorham*, we hold that the instant verification was sufficient to establish personal knowledge of the facts and matters contained in the trial court record. In so holding, we emphasize the fact that Henegar was careful to state that "each and all of these facts and matters are true and correct."<sup>24</sup>

The foregoing language has much to commend it. If a Gorham, or a Henegar, or the next similarly situated post-conviction claimant, asserts in his motion that he learned material facts from a presumably reliable hearsay declarant such as his attorney, and on that basis asserts that those facts are true and correct, his ensuing prosecution for perjury if the hearsay datum turned out to be false would strike no one as entirely fair and just. Undoubtedly many post-conviction

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<sup>24</sup> *Id.*

motions, and particularly many *pro se* post-conviction motions, are spurious and ought not to be filed; but to place the post-conviction claimant possessed of facially credible facts obtained from a presumably reliable hearsay source between the Scylla of leaving his valid post-conviction claim unfiled and the Charybdis of being charged with perjury due to the falsehood or misunderstanding of another is surely not what the statute and cases contemplate. Nor does *Gorham* solve the problem. If information provided to a post-conviction claimant via hearsay, or even second-hand hearsay, can be safely included in a motion over a jurat that claims “personal knowledge” that the information in question is “true and correct,” as *Gorham* seems to teach, then it is difficult to imagine what protection the courts derive from that jurat. The reported opinions reflect no case in which a movant was prosecuted for perjury because the information he derived from his lawyer, or a comparably reliable hearsay declarant, later proved untrue. It is unlikely that any such prosecution will ever be brought – the more so in light of the present version of the jurat employed in Rule 3.987.<sup>25</sup>

That said, Florida courts continue to be fastidious in requiring strict compliance with the

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<sup>25</sup> The question in *State v. Zipfel*, 527 So. 2d 1099 (Fla. 3d DCA 1989) was whether a prosecutor, in traversing a sworn motion to dismiss brought pursuant to Fla. R. Crim. P. 3.190(c)(4), was obliged swear to the traverse based upon personal knowledge. *Zipfel*, 527 So. 2d at 1099. See Fla. R. Crim. P. 3.190(d). The court recognized that, “it would be impossible for a state attorney or assistant [state attorney], in all probability, to make an oath to a traverse upon personal knowledge.” *Zipfel* at 1099. In the court’s view, it is sufficient for the assistant state attorney traversing a sworn motion to dismiss to swear that he has received information from a material witness, and proceeds in good-faith reliance on that information. *Id.* at 1099; 1100 n. 2. Whether an analogy could be made to a post-conviction claimant who proceeds in good-faith reliance on information received from a reliable first-hand witness, or an otherwise reliable reporter, is something the cases have not considered.

technical requirements of the oath supporting a 3.850 claim. The oath employed in *Placide v. State*<sup>26</sup> was wrong twice over: first, because it included the “to the best of my knowledge and belief” locution;<sup>27</sup> second, because the affidavit did “not reflect that it was sworn to before an individual authorized to administer oaths.”<sup>28</sup>

The statement signed by the notary provides only: “I, the undersigned Notary Public, do hereby affirm that Marie Blackwell personally appeared before me on the 20<sup>th</sup> of March 2014, and signed the above Affidavit as his (*sic*) free and voluntary act and deed.” The notary affirms merely that Blackwell signed the statement, not that she made the statement under oath. Thus the statement is not properly verified and is insufficient.<sup>29</sup>

When an insufficient affidavit is subscribed to an otherwise-sufficient motion under 3.850, the remedy is denial without prejudice to afford the movant an opportunity to re-plead.<sup>30</sup> The post-conviction court in *Hand v. State*<sup>31</sup> “granted Hand an opportunity to amend, specifically

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<sup>26</sup> *Placide v. State*, 189 So. 3d 810 (Fla. 4<sup>th</sup> DCA 2015). The affidavit at issue in *Placide* was not that of the movant, but was that of a witness offered in support of a claim of newly-discovered evidence. See II D 1, *infra*. The defects in the oath supporting the affidavit in *Placide*, however, would be defects in an oath supporting a movant’s affidavit.

<sup>27</sup> *Placide*, 189 So. 3d at 813.

<sup>28</sup> *Id.* In *Neeley v. State*, 346 So. 3d 74 (Fla. 4<sup>th</sup> DCA 2022), the movant, rather than employing the customary form of oath, employed the form of written declaration appearing at Fla. Stat. § 92.525(2). The court of appeal found this to be acceptable. In so doing, it made explicit that *Placide* did not require a contrary result.

<sup>29</sup> *Placide*, 189 So. 3d at 813.

<sup>30</sup> *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993).

<sup>31</sup> 315 So. 3d 774 (Fla. 5<sup>th</sup> DCA 2021).

identified the insufficient oath, and warned Hand that the amended motion might be summarily denied if it remained deficient.”<sup>32</sup> When Hand re-submitted his motion with a still-deficient oath, the court made good on its promise, entering a summary denial. The appellate court affirmed. “[T]he post-conviction court did not abuse its discretion when it summarily denied Hand’s second amended motion.”<sup>33</sup>

## 2. Other technical pleading requirements; permitting re-pleading as to technical defects

A facially-sufficient motion under Rule 3.850 must identify the judgment or sentence it purports to attack, and the court which rendered that judgment or sentence.<sup>34</sup> It must identify any appeals that were taken from the demised judgment or sentence, and the disposition of those appeals.<sup>35</sup> It must make clear what relief is sought,<sup>36</sup> and must include a factual recitation sufficient to enable the post-conviction court to adjudicate the motion.<sup>37</sup> Mere conclusory allegations are insufficient to meet the defendant’s burden on motion for postconviction relief.<sup>38</sup>

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<sup>32</sup> *Hand*, 315 So. 3d at 775.

<sup>33</sup> *Id.* at 776.

<sup>34</sup> Fla. R. Crim. P. 3.850(c)(1).

<sup>35</sup> Fla. R. Crim. P. 3.850(c)(3).

<sup>36</sup> Fla. R. Crim. P. 3.850(c)(6). The post-conviction court can grant relief only on a ground or grounds raised by the defendant. *State v. Dixon*, 294 So. 3d 334, 336 (Fla. 4<sup>th</sup> DCA 2020) (citing *State v. Daniels*, 826 So. 2d 1045, 1046 (Fla. 5<sup>th</sup> DCA 2002); *Roberts v. State*, 715 So. 2d 302, 303 (Fla. 5<sup>th</sup> DCA 1998)).

<sup>37</sup> Fla. R. Crim. P. 3.850(c)(7).

<sup>38</sup> *See, e.g., Jones v. State*, 928 So. 2d 1178, 1182 (Fla. 2006); *Parker v. State*, 904 So. 2d 370, 378 (Fla. 2005); *Wright v. State*, 857 So. 2d 861, 873 (Fla. 2003); *Reaves v. State*, 826 So.

Given the technical intricacies of pleading a facially-sufficient claim under Rule 3.850, courts adjudicate *pro se* pleadings based on their substance and not based upon the often-incorrect titles given them by their *pro se* authors. “Where a movant files a properly pleaded claim but incorrectly styles the postconviction motion in which it was raised, the trial court must treat the claim as if it had been filed in a properly styled motion.”<sup>39</sup> It is a maxim in the law of post-conviction procedure that *pro se* pleadings are to be liberally construed for the benefit of the pleader,<sup>40</sup> but it is equally true that *pro se* “litigants are required to meet the pleading standards of

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2d 932, 939-40 (Fla. 2002); *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000).

<sup>39</sup> *Gill v. State*, 829 So. 2d 299, 300 (Fla. 2d DCA 2002) (citing *Hogan v. State*, 799 So. 2d 1095 (Fla. 2d DCA 2001)). See *Bover v. State*, 797 So. 2d 1246, 1250 (Fla. 2001); *Aswell v. State*, 310 So. 3d 983 (Fla. 2d DCA 2020); *Kelsey v. State*, 97 So. 3d 978, 979 (Fla. 1st DCA 2012); *Mustelier v. State*, 965 So. 2d 192, 193 (Fla. 3d DCA 2007). Of course this “substance over form” rule of construction does not relieve the pleader of the obligation to comply with the technical requirements of Rule 3.850. A movant could not, for example, file an untimely claim seeking to vacate his judgment or sentence, denominate it as being filed under Rule 3.800, then demand that it be adjudicated as if filed under Rule 3.850 because of its substance, and thus evade the time limitation of 3.850(b). See, e.g., *Butler v. State*, 917 So. 2d 244 (Fla. 2d DCA 2005). See also *Duncan v. State*, 259 So. 3d 926, 927 (Fla. 5<sup>th</sup> DCA 2018) (citing *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007) (collateral attack on criminal conviction purporting to be brought pursuant to Fla. R. Civ. P. 1.540 should be treated as if brought pursuant to Fla. R. Crim. P. 3.850, but must be pleaded in compliance with the requirements of the criminal rule); *Kemp v. State*, 245 So. 3d 987, 987 (Fla. 3d DCA 2018) (claimant filed “petition for writ of error *coram nobis*. The trial court properly treated the petition as a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. ... Accordingly, [claimant’s] post-conviction motion is untimely pursuant to Rule 3.850(b) as it was filed more than nine years after his guilty plea and sentence were entered”).

<sup>40</sup> *Willis v. State*, 840 So. 2d 1135, 1136 (Fla. 4<sup>th</sup> DCA 2003) (“*Pro se* motions should be given liberal construction”); *Gust v. State*, 558 So. 2d 450, 453 (Fla. 1<sup>st</sup> DCA 1990) (quoting *Thomas v. State*, 164 So. 2d 857, 857 n. 1 (Fla. 2d DCA 1964)); *Tillman v. State*, 287 So. 2d 693, 694 (Fla. 2d DCA 1973).

the rules and bear the burden of demonstrating a basis for post-conviction relief.”<sup>41</sup>

The movant in *Clough v. State*<sup>42</sup> filed a pleading that he captioned a petition for writ of *habeas corpus*. The post-conviction court treated the pleading as a motion pursuant to Rule 3.850 and adjudicated it as such.<sup>43</sup> On appeal, Clough made an intriguing argument: He claimed that by converting his *habeas* action into a 3.850 motion without notice to him, the post-conviction court deprived him of due process, on the grounds that he would likely be barred from bringing, in any future motion under Rule 3.850, any claims not asserted in his *habeas* petition.<sup>44</sup> According to Clough, “to avoid any constitutional infirmity, the post-conviction court should have dismissed the petition for lack of jurisdiction or, if it chose to proceed under Rule 3.850, it should have given Mr. Clough notice of its intention and afforded him an opportunity to amend or withdraw his petition.”<sup>45</sup>

Intriguing as was Mr. Clough’s argument, the court of appeal rejected it. It was not a due process violation for the post-conviction court to fail to give Clough notice of its intent to treat his *habeas* petition as having been brought pursuant to Rule 3.850 because it was not necessarily the case that adjudication of the petition as a Rule 3.850 motion would bar all future motions brought under that rule. The post-conviction court would still have discretion to receive

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<sup>41</sup> *Prince v. State*, 40 So. 3d 11, 12 (Fla. 4th DCA 2010).

<sup>42</sup> 136 So. 3d 680 (Fla. 2d DCA 2014).

<sup>43</sup> *Clough*, 136 So. 3d at 681.

<sup>44</sup> *Id.* at 681-82. See discussion of successiveness, *infra* at II B.

<sup>45</sup> *Id.* at 682.

subsequent, admittedly successive, 3.850 motions if there were a sufficient basis to do so.<sup>46</sup>

Until such time as Mr. Clough filed a successive motion and the post-conviction court declined, on grounds of successiveness, to adjudicate it, the appellate court had no more than a hypothetical question before it.<sup>47</sup> “Quite simply, the issue is not ripe for review.”<sup>48</sup>

If a timely-filed motion under Rule 3.850 is facially insufficient, the post-conviction court is to deny the motion without prejudice and afford the pleader 60 days to remedy the insufficiency.<sup>49</sup> The “court abuses its discretion in failing to allow the defendant at least one opportunity to correct the deficiency unless it cannot be corrected.”<sup>50</sup> But the court enjoys substantial discretion in this regard, and is “not required to provide ... multiple opportunities [for the pleader] to” amend a facially insufficient motion.<sup>51</sup>

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<sup>46</sup> *Id.* at 683. In *Castro v. United States*, 540 U.S. 375 (2003), the Supreme Court held that a U.S. district court cannot recharacterize as having been brought pursuant to 28 U.S.C. 2255 (the federal congener to Florida’s Rule 3.850) a *pro se* motion labeled differently unless the court informs the *pro se* movant of its intent to recharacterize the motion, informs the movant of the potential consequences of that recharacterization, and affords the movant an opportunity to amend or withdraw the motion. *Castro*, 540 U.S. at 377. *See also Ponton v. Sec’y, Fla. Dep’t of Corr.*, 891 F. 3d 950, 954 (11<sup>th</sup> Cir. 2018) (applying same principle to pre-*Castro* pleadings).

<sup>47</sup> *Id.* at 684.

<sup>48</sup> *Id.* *See also Casaigne v. State*, 310 So. 3d 460 (Fla. 2d DCA 2020).

<sup>49</sup> Fla. R. Crim. P. 3.850(f)(2). *Spera v. State*, 971 So. 2d 754 (Fla. 2007). *See also Howard v. State*, 318 So. 3d 1266 (Fla. 2d DCA 2021); *Evans v. State*, 309 So. 3d 267 (Fla. 3d DCA 2020); *McCray v. State*, 278 So. 3d 773 (Fla. 3d DCA 2019); *Carey v. State*, 190 So. 3d 122 (Fla. 4th DCA 2015); *Foley v. State*, 162 So. 3d 1144 (Fla. 1st DCA 2015).

<sup>50</sup> *Spera*, 971 So. 2d at 755.

<sup>51</sup> *Jackson v. State*, 127 So. 3d 706 (Fla. 4th DCA 2013) (citing *Cortes v. State*, 85 So. 2d 1135 (Fla. 4th DCA 2012), *rev. denied*, 104 So. 3d 1083 (Fla. 2012)). *See also Corbett v. State*,

It sometimes happens that a post-conviction claimant will withdraw his motion prior to adjudication. As a general rule, the “motion should not be dismissed with prejudice when the defendant volunteers to dismiss it unless there is prejudice to the State or some justification for resolving the motion on the merits.”<sup>52</sup>

The post-conviction movant in *Conley v. State*<sup>53</sup> alleged that his trial counsel had rendered ineffective assistance by failing to demand a *Franks* hearing to challenge the validity of the affidavit supporting the warrant pursuant to which Mr. Conley was arrested.<sup>54</sup> To plead deficient performance, Conley would have been obliged to allege that the affiant officer misstated material information intentionally or with reckless disregard for the truth, rather than through mere negligence; and that the affidavit, stripped of the untruthful or misleading portion,

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267 So. 3d 1051, 1057 (Fla. 1<sup>st</sup> DCA 2019) (quoting *Nelson v. State*, 977 So.2d 710, 711 (Fla. 1<sup>st</sup> DCA 2008) (“Although a trial court in its discretion may grant more than one opportunity to amend an insufficient claim, *Spera* does not mandate repeated opportunities”). In *Cortes*, the Fourth District cited its prior opinion in *Mancino v. State*, 10 So. 3d 1203, 1204 (Fla. 4th DCA 2009) for the proposition “that *Spera* does not require an opportunity to amend conclusory claims.” Undoubtedly post-conviction courts are to be afforded some latitude in this regard, and undoubtedly there are post-conviction motions filed that are so hopelessly insufficient and seemingly baseless that the prospect of their being re-pleaded in such a way as to present a meritorious claim teeters on the non-existent. But no court will ever be reversed for granting the author of such a claim 60 days to do better. See *James v. State*, 185 So. 3d 649 (Fla. 2d DCA 2016).

<sup>52</sup> *McCray v. State*, 104 So. 3d 1201, 1201 (Fla. 2d DCA 2012). See also *Larson v. State*, 329 So. 3d 815 (Fla. 2d DCA 2021).

<sup>53</sup> 226 So. 3d 358 (Fla. 2d DCA 2017).

<sup>54</sup> *Conley*, 226 So. 3d at 358 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

would have been insufficient to support a warrant.<sup>55</sup>

Conley's claim was insufficiently pleaded. He alleged the falsity of the information in the officer's affidavit, but not its *intentional* falsity.<sup>56</sup> In reaching the merits and denying the motion with prejudice, the post-conviction court erred. It should have afforded Conley an opportunity to rectify the pleading deficiency.

#### B. Successive claims

When an initial motion for post-conviction relief raises a claim cognizable under Rule 3.850, and a subsequent motion is filed raising additional grounds, the defendant "must state legitimate reasons why the facts in support of his present claim were not known and could not have been known at the time of the filing of his first motion."<sup>57</sup> The defendant is required to justify "the failure to raise the asserted issues in the first motion."<sup>58</sup> Otherwise, the successive

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<sup>55</sup> *Conley*, 226 So. 3d at 358 (citing *State v. Petroni*, 123 So. 3d 62, 64 (Fla. 1<sup>st</sup> DCA 2013) (in turn citing *Franks*, 438 U.S. at 168, 171-72)). As to the prejudice prong of a post-conviction claim, the *Conley* court "note[d] that a postconviction court could find a defendant's claim of prejudice for failing to obtain a *Franks* hearing meritless if there was sufficient evidence for a conviction that was independent of the arrest." *Conley*, 226 So.3d at 360 (citing *Darby v. State*, 502 So. 2d 1358, 1359 (Fla. 5<sup>th</sup> DCA 1987)).

<sup>56</sup> *Conley*, 226 So. 3d at 358.

<sup>57</sup> *Pinder v. State*, 42 So. 3d 335, 337 (Fla. 3d DCA 2010) (citing *Christopher v. State*, 489 So. 2d 22, 24 (Fla. 1986)). See also *Rivera v. State*, 187 So. 3d 822, 831-32 (Fla. 2015) ("In a successive Rule 3.850 motion, a defendant must establish that the facts for any claims raised could not have been discovered earlier through the exercise of due diligence").

<sup>58</sup> *McKenley v. State*, 937 So. 2d 223, 225 (Fla. 3d DCA 2006).

motion constitutes an abuse of process and may be dismissed.<sup>59</sup> “A motion may be dismissed as improperly successive if it fails to allege new or different grounds for relief, and the prior determination of insufficiency was made on the merits of the claim.”<sup>60</sup>

The necessity for a strict application of the rule against successive pleading was explained by a panel of the Fourth District in language that would no doubt be embraced by every Florida judge:

The procedural bars that prohibit the filing of untimely and successive postconviction motions are critical to the proper administration of justice. ... Were the courts of this state filled with stale, repetitive, and successive postconviction motions raising claims in a piecemeal fashion, then justice for those raising timely, legitimate claims would be delayed and may ultimately be denied. For these reasons, a defendant seeking to bring an untimely or successive postconviction motion must meet strict requirements for establishing the narrow exceptions to these procedural bars.<sup>61</sup>

In *Jackman v. State*<sup>62</sup> the defendant’s post-conviction motion was summarily denied, from

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<sup>59</sup> See *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003); *Koons v. State*, 165 So. 3d 718, 719 (Fla. 5th DCA 2015); *McKenley v. State*, 937 So. 2d at 225.

<sup>60</sup> *Greene v. State*, 200 So. 3d 102, 103 (Fla. 5th DCA 2015). In *Greene*, a motion alleging newly discovered evidence was dismissed for failure to attach an affidavit, in violation of Fla. R. Crim. P. 3.850( c). Such a dismissal, however, was not an adjudication on the merits; and a subsequent motion correcting that deficiency was not successive. *Greene*, 200 So. 3d at 103 (citing *Hutto v. State*, 981 So. 2d 1236, 1238 (Fla. 1st DCA 2008)).

<sup>61</sup> *Erlsten v. State*, 78 So. 3d 60, 61 (Fla. 4th DCA 2012).

<sup>62</sup> 88 So. 3d 325 (Fla. 4th DCA 2012).

which denial he appealed.<sup>63</sup> While the appeal was pending Jackman filed a second post-conviction motion before the trial court.<sup>64</sup> The trial court, relying on *Washington v. State*,<sup>65</sup> determined that it was divested of jurisdiction by the pendency of the appeal, and on that basis dismissed the second motion.<sup>66</sup>

Citing to the opinion of the Second District in *Bryant v. State*,<sup>67</sup> the Fourth District receded from its *Washington* opinion and “h[e]ld that a trial court has authority to consider or to defer ruling and stay a subsequently filed postconviction motion that raises unrelated issues notwithstanding the pendency of an appeal of an order on a previously filed postconviction motion.”<sup>68</sup> By “accepting the filing of the subsequent motion rather than dismissing it [the trial court] protects the defendant from the risk of procedural default resulting from the two-year time

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<sup>63</sup> *Jackman*, 88 So. 3d at 325.

<sup>64</sup> *Id.* at 326.

<sup>65</sup> *Washington v. State*, 823 So. 2d 248 (Fla. 4th DCA 2002).

<sup>66</sup> *Jackman*, 88 So. 3d at 326.

<sup>67</sup> 102 So. 3d 660 (Fla. 2d DCA 2012). *See also Sabbag v. State*, 141 So. 3d 604 (Fla. 2d DCA 2014).

<sup>68</sup> *Jackman* at 327. This rule applies only to “a subsequently filed post-conviction motion that raises *unrelated* issues.” *Id.* (emphasis added). Where the pending post-conviction appeal and the allegations raised in the subsequently filed motion are clearly related, the trial court is without jurisdiction to proceed. *Murphy v. State*, 292 So. 3d 916 (Fla. 5<sup>th</sup> DCA 2020); *Nilio v. State*, 292 So. 3d 826 (Fla. 1<sup>st</sup> DCA 2020); *Hill v. Jones*, 243 So. 3d 528 (Fla. 1<sup>st</sup> DCA 2018); *Siskos v. State*, 163 So. 3d 739, 740 (Fla. 5<sup>th</sup> DCA 2015). *See also Leatherwood v. State*, 168 So. 3d 328 (Fla. 3d DCA 2015).

limit [of Rule 3.850(b)<sup>69</sup>]. ... If the trial court deems it prudent to defer ruling while the appeal is pending, it has the authority to stay its consideration of the new motion.”<sup>70</sup>

### C. Procedurally barred claims<sup>71</sup>

“This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.”<sup>72</sup> Thus there exist

two different kinds of procedural defaults. A defendant who did present an issue on direct appeal cannot raise the same issue again in a subsequent postconviction motion, because the decision of the appellate court is the law of the case. In contrast, a defendant who did not present an issue on direct appeal when a remedy was then available cannot raise the issue in a subsequent postconviction

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<sup>69</sup> See *infra* at II. D.

<sup>70</sup> *Jackman* at 326. In *Rua-Torbizco v. State*, 237 So.3d 1065 (Fla. 3d DCA 2017), the court felt itself obliged to follow district precedent that was at odds with the *Bryant/Jackman* line of cases, but “suggest[ed] that the unintended consequence (*i.e.*, a procedural bar) which could follow from a trial court’s order dismissing a second motion for lack of jurisdiction may easily be avoided by simply abating the second motion until the conclusion of the appeal from the order on the first motion.” *Rua-Torbizco*, 237 So.3d at 1065, n. 3. See also *Rhow v. State*, 264 So. 3d 288, 289 (Fla. 1<sup>st</sup> DCA 2019).

<sup>71</sup> See also *discussion infra* at V. E.

<sup>72</sup> Fla. R. Crim. P. 3.850(c)(7); Fla. Stat. § 924.051(8) (“It is the intent of the Legislature that all terms and conditions of ... collateral review be strictly enforced, including the application of procedural bars”). See *Parker v. State*, 611 So. 2d 1224, 1226 (Fla. 1992) (“We have repeatedly said that a motion under Rule 3.850 cannot be used for a second appeal to consider issues that either were raised in the initial appeal or could have been raised in that appeal”); *Mikenas v. State*, 460 So. 2d 359 (Fla. 1985); *Dunn v. State*, 282 So. 3d 899, 902 (Fla. 1<sup>st</sup> DCA 2019) (“[C]laims of trial court error are not cognizable in a motion for post-conviction relief. . . . Those claims must be raised on direct appeal”); *Austin v. State*, 160 So. 2d 730 (Fla. 2d DCA 1964).

motion.<sup>73</sup>

The foregoing principle, readily stated and seemingly unimpeachable in its logic, is under unceasing assault by post-conviction claimants who seek to recast on collateral attack those claims of error that they asserted unsuccessfully on direct appeal.<sup>74</sup> The matter is made more difficult by the absence of a single defining test or principle by which claims cognizable on direct appeal but not on post-conviction motion are readily distinguishable from claims cognizable by post-conviction motion but not on direct appeal.<sup>75</sup> Of course subsection (a) of Rule 3.850 defines in broad terms the categories of claims that can be brought under the rule.<sup>76</sup> But perhaps the best

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<sup>73</sup> *Moore v. State*, 768 So. 2d 1140, 1141-42 (Fla. 1st DCA 2000) (footnote omitted) (citing *People v. Enoch*, 146 Ill. 2d 44, 165 Ill. Dec. 719, 585 N.E.2d 115 (1991); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991)). In *Mickles v. State*, 264 So. 3d 1099 (Fla. 1st DCA 2019), the post-conviction movant claimed ineffective assistance of counsel because his attorney failed to object when the court imposed a sentence in excess of the terms of the plea agreement. “Because [Mickles] did not move to withdraw his plea, this claim could not have been reached on direct appeal and was properly raised through a Rule 3.850 motion.” *Mickles*, 264 So.3d at 1011.

<sup>74</sup> And in some instances those assaults are successful. In *Waldburg v. State*, 644 So. 2d 608 (Fla. 1st DCA 1994), defendant’s 3.850 motion averred both a denial by the trial court of defendant’s right to a speedy trial and the ineffectiveness of trial counsel in failing properly to assert that right to speedy trial. The former claim “could or should have been raised on direct appeal and is thus improper to raise under Rule 3.850.” *Waldburg*, 644 So. 2d at 608. The latter claim “presents a cognizable basis for post-conviction relief.” *Id.* at 609.

<sup>75</sup> See, e.g., *Yates v. State*, 509 So. 2d 1249 (Fla. 5th DCA 1987) (under then-existing statutory scheme for sentencing court’s retention of jurisdiction over sentenced defendant, issue of wrongful retention could be raised either on direct appeal or via Rule 3.850); *Styles v. State*, 465 So. 2d 1369 (Fla. 2d DCA 1985) (same).

<sup>76</sup> (1) The judgment was entered or sentence was imposed in violation of the Constitution or law of the United States or the State of Florida.

(2) The court did not have jurisdiction to enter the judgment.

(3) The court did not have jurisdiction to impose the sentence.

attempt at drawing a dividing line between issues properly asserted on direct appeal and issues properly reserved for collateral attack appears in *Corzo v. State*<sup>77</sup>:

The policies [distinguishing those claims that may be raised on direct appeal and those that must be brought by post-conviction claim] are designed to assure that direct appeal issues are considered only once, and that matters that require inquiry beyond the face of the record are reviewed in a forum that is equipped to conduct the additional evidentiary inquiry. For example, a defendant may raise on direct appeal the issue of whether the trial court erred when it denied a motion for new trial. Because that issue may be raised on direct appeal, it may not be raised later in a motion under rule 3.850. Likewise, the defendant may not raise the same issue again merely by recasting it as a claim for ineffective assistance of counsel. Thus, in this hypothetical, the defendant could not argue in a postconviction motion that his lawyer was ineffective, because the trial court denied the motion for new trial. In that situation, the postconviction allegation is simply adding the words “ineffective assistance of counsel” without adding any new facts or legal arguments.

On the other hand, the fact that a defendant unsuccessfully raised the denial of his motion for new trial on direct appeal would not bar a claim that his counsel was ineffective because counsel filed an untimely motion for new trial or because counsel omitted a critical ground when drafting and arguing that motion. In such a situation, unlike the previous hypothetical, the postconviction motion is not merely repeating the issue raised on direct appeal. Instead, it is raising a separate issue that is somewhat interrelated with the issue raised on direct appeal. In such a case, the defendant often needs to allege and explain that his appellate counsel was unsuccessful on an issue during the direct appeal because his trial counsel was ineffective during the presentation of that issue in the

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(4) The sentence exceeded the maximum authorized by law.

(5) The plea was involuntary.

(6) The judgment or sentence is otherwise subject to collateral attack.

<sup>77</sup> 806 So. 2d 642 (Fla. 2d DCA 2002).

trial court.<sup>78</sup>

As the foregoing language suggests, even with respect to the claim most commonly and frequently asserted via Rule 3.850 – that of ineffective assistance of counsel – the dividing line between direct appeal and collateral attack is blurred. The general rule is that claims of ineffective assistance of counsel may not be raised on direct appeal.<sup>79</sup> Prior to the recent opinion of the Florida Supreme Court in *Steiger v. State*,<sup>80</sup> an exception was made when three conditions were met: the ineffectiveness was obvious on the face of the record, the prejudice caused by the ineffective representation was indisputable, and there could not be any tactical justification for the putatively ineffective conduct.<sup>81</sup> The defendant in *Larry v. State*<sup>82</sup> was tried and convicted for delivery of a controlled substance within 1,000 feet of a convenience store.<sup>83</sup> At trial, the prosecution’s lead detective testified that the demised drug transaction took place at a gas station that had at least 10,000 feet of retail space.<sup>84</sup> The statute under which Larry was prosecuted, however, provided that a “convenience business” excluded any location with at

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<sup>78</sup> *Corzo*, 806 So. 2d at 644-45 (fn. omitted).

<sup>79</sup> *Bruno v. State*, 807 So. 2d 55 (Fla. 2001); *Stewart v. State*, 420 So. 2d 862 (Fla. 1982).

<sup>80</sup> 328 So. 3d 926 (Fla. 2021). *See discussion infra* at \_\_\_\_.

<sup>81</sup> *Corzo*, 806 So. 2d at 645. *See also discussion infra* at V.E.

<sup>82</sup> *Larry v. State*, 61 So. 3d 1205 (Fla. 5th DCA 2011).

<sup>83</sup> *Larry*, 61 So. 3d at 1206.

<sup>84</sup> *Id.*

least 10,000 feet of retail floor space.<sup>85</sup> “Thus in its case in chief the State proved that the business where the drug transaction occurred was not a convenience business as defined by statute. ... [T]rial counsel ... failed to raise this obvious defense.”<sup>86</sup> Had this defense been asserted, the trial court would at a minimum have been obliged to reduce the charge to the lesser-included offense of delivery of a controlled substance.

Thus the ineffectiveness of trial counsel was plain on the face of the record, and the prejudice was incontrovertible. And the court could “discern no plausible strategic reason why trial counsel did not pursue this defense in light of the State’s evidence.”<sup>87</sup> In this regard, the test is not whether trial counsel made a tactical decision that the appellate court deemed unwise or inferior to other tactical options. For the court to find the third prong of this test to be met, and a claim of ineffectiveness to be redressable on direct appeal, there must exist *no* colorable tactical justification for counsel’s action. Clearly that was the case in *Larry*. Although the defense that trial counsel argued to the jury was that no drug transaction had ever actually occurred,<sup>88</sup> trial counsel had nothing to lose, and everything to gain, by arguing to the court out of the presence of the jury at motion for judgment of acquittal that a material element of the charged crime – that the delivery took place in or near a convenience store – had been entirely disproved by the prosecution’s star witness. There could be no tactical justification for the failure to make such an

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<sup>85</sup> *Id.*, citing Fla. Stat. § 812.171(3) (1990).

<sup>86</sup> *Larry*, 61 So. 3d at 1206.

<sup>87</sup> *Id.* at 1207.

<sup>88</sup> *Id.* at 1208 n. 2.

argument.<sup>89</sup>

The defendant in *Mathis v. State*<sup>90</sup> was charged with “capital” sexual battery – *i.e.*, sexual battery on a child under 12, punishable by mandatory life imprisonment – and two counts of unlawful sexual activity with the same victim, these two counts involving conduct that occurred with the victim when she was over 12 years of age.<sup>91</sup> Sentenced to life as to the first count and to 15 years as to the others, Mathis argued on direct appeal that it was patently ineffective for his trial counsel to have failed to move to dismiss the second and third counts on statute-of-limitations grounds.<sup>92</sup>

The appellate court declined to adjudicate the ineffective assistance claim on direct appeal. Even “assuming there was a statute-of-limitations defense as to the” second and third counts, “it is conceivable that a reasonable attorney might strategically abandon it.”<sup>93</sup> Arguably,

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<sup>89</sup> See *Larry*, 61 So. 3d at 1207 (citing *In Re Hubert*, 137 Wash. App. 924, 158 P.3d 1282, 1285 (2007); *State v. Sellers*, 248 P.3d 70 (Utah Ct. App. 2011); *State v. Powell*, 150 Wash. App. 139, 206 P.3d 703 (2009); *Mizell v. State*, 716 So. 2d 829 (Fla. 3d DCA 1998)). See also *Hardman v. State*, 217 So. 3d 107 (Fla. 4<sup>th</sup> DCA 2017) (ineffectiveness arising from failure to request jury instruction as to the defense asserted at trial where evidence supported the giving of such an instruction cognizable on direct appeal); *Barnes v. State*, 218 So.3d 500 (Fla. 5<sup>th</sup> DCA 2017) (failure to argue insufficiency of evidence of premeditation); *Bracey v. State*, 109 So. 3d 311 (Fla. 2d DCA 2013). Cf. *Hartley v. State*, 206 So.3d 836 (Fla. 1<sup>st</sup> DCA 2016); *Dukes v. State*, 160 So. 3d 76 (Fla. 4<sup>th</sup> DCA 2015) (where codefendant threatened witness, defendant’s attorney’s failure to move for severance from codefendant was not ineffectiveness plain on the face of the record).

<sup>90</sup> 204 So. 3d 104 (Fla. 1<sup>st</sup> DCA 2016).

<sup>91</sup> *Mathis*, 204 So. 3d at 105.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

“a reasonable attorney might have sought to avoid giving the jury only two choices – capital sexual battery and acquittal. Counsel might have strategically determined that Mathis could fare better if the jury had a third option – convicting him of a sex crime that would not result in a mandatory life sentence.”<sup>94</sup> Whether Mathis’s trial counsel actually made this strategic assessment is unknowable, and in any event beside the point. When a claim of ineffective assistance is asserted on direct appeal, the appellate court’s ability to posit a reasonable tactical justification for trial counsel’s conduct is sufficient to render the claim nonadjudicable.<sup>95</sup>

In a thoughtful concurrence in *Latson v. State*,<sup>96</sup> Judge Winokur expresses valid concerns about the expansion of claims of ineffective assistance of counsel on direct appeal, which claims purport to invoke the exception for ineffectiveness apparent on the face of the record below. “Instead of arguing that ... unpreserved error was fundamental, more and more defendants are claiming on appeal that their trial counsel was ineffective for failing to raise at trial whatever alleged error they wish to raise on appeal and that this ineffectiveness itself provides a basis for reversal on direct appeal.”<sup>97</sup> Ordinarily, appellate claims are not considered unless the assigned error was preserved below, or the unpreserved error is fundamental. Judge Winokur’s concern is that by re-casting assignments of error as ineffective assistance apparent on the face of the trial record, appellants can obtain review of claims that are neither preserved nor fundamental, and

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<sup>94</sup> *Id.* at 106.

<sup>95</sup> *See, e.g., Phillips v. State*, 225 So. 3d 269 (Fla. 4<sup>th</sup> DCA 2017).

<sup>96</sup> 193 So. 3d 1070 (Fla. 1<sup>st</sup> DCA 2016).

<sup>97</sup> *Latson*, 193 So. 3d at 1072 (Winokur, J., concurring).

thus not properly considered at all. “[I]n some instances, direct-appeal ineffective assistance employs an easier standard” to obtain appellate review “than the fundamental-error standard.”<sup>98</sup>

Judge Winokur’s position carried the day in *Steiger v. State*.<sup>99</sup> There, the court held that pursuant to Fla. Stat. § 924.051(3)<sup>100</sup> a claim of ineffective assistance may not be raised on direct appeal unless it was preserved at the trial level, absent an allegation of fundamental error.

It is difficult to imagine how a claim of ineffective assistance *of* trial counsel would be preserved *by* trial counsel. A post-verdict motion, brought pursuant to Fla. R. Crim. P. 3.580 (which authorizes the trial court to grant a new trial upon sufficient grounds) and Fla. R. Crim. P. 3.600, presumably at subpart (b)(8) (providing that it is grounds to grant a new trial that the defendant, through no fault of his own, did not receive a fair and impartial trial, and was prejudiced), would have to allege what trial counsel did that was ineffective, and how the defendant was prejudiced as a consequence of that defect of performance. But it would be a rare and special trial lawyer who, within ten days of the rendition of the verdict, Fla. R. Crim. P.

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<sup>98</sup> *Id.* at 1075, n. 3. See also *Marshall v. State*, 291 So. 3d 614 (Fla. 1<sup>st</sup> DCA 2020); *Sorey v. State*, 252 So. 3d 853 (Fla. 1<sup>st</sup> DCA 2018).

<sup>99</sup> 328 So. 3d 926 (Fla. 2021).

<sup>100</sup>

An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

3.590(a), has identified, and is prepared to argue to the court, the respects in which he rendered constitutionally ineffective assistance in the case he just tried. Will courtroom observers routinely be treated to the following burlesque?

Defense counsel: Your Honor, now that the jury has retired, I move for mistrial or for a new trial on the grounds of my ineffective assistance of counsel.

The Court: What ineffective assistance?

Defense counsel: Um . . . I'm not really sure . . . I mean, I did my very best, but . . . I want to preserve my client's claim of ineffective assistance for direct appeal, so on the basis of whatever I did that was ineffective, I move for mistrial or for a new trial.

The Court: Counsel, unless you can identify something that was arguably defective, and that as a consequence of which your client was prejudiced, I don't see how you've preserved anything at all.

Defense counsel: Then . . . then . . . I move for mistrial or for a new trial on the grounds that I've rendered ineffective assistance of counsel by failing to preserve my client's entitlement to a direct appeal on the issue of ineffective assistance of counsel!

*Steiger* takes on new and greater significance in light of the Supreme Court's opinion in *Shinn v. Martinez Ramirez*.<sup>101</sup> *Shinn* involved two Arizona cases, consolidated for argument before the Court, in which ineffective post-conviction counsel failed to raise the ineffectiveness of trial counsel. The defendants then brought habeas petitions in federal district court. The issue was whether the federal habeas court had power to conduct an evidentiary determination of the

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<sup>101</sup> \_\_\_\_ U.S. \_\_\_\_ (May 23, 2022).

claim of ineffective assistance of state-court trial counsel. The Supreme Court held that, “a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state post-conviction counsel.”<sup>102</sup> “[B]ecause there is no constitutional right to counsel in state post-conviction proceedings . . . a prisoner must bear responsibility for all attorney errors during those proceedings . . . . Among those errors, a state prisoner is responsible for counsel’s negligent failure to develop the state post-conviction record.”<sup>103</sup> The failure of post-conviction counsel to raise the ineffectiveness of trial counsel was the movant’s procedural default. He has no constitutional right to post-conviction counsel, and therefore no right to effective post-conviction counsel. In her dissent, Justice Sotomayor points out that this analysis applies “in Arizona and other states” – like Florida after *Steiger, supra* – “that do not allow defendants to raise trial-ineffectiveness claims on direct appeal, where individuals are constitutionally entitled to effective counsel, and instead require them to raise these claims for the first time in collateral proceedings.”<sup>104</sup>

Although *Steiger* appears to sound the death knell for claims of ineffective assistance on direct appeal, the court acknowledged “the rare case” in which “ineffective assistance of . . . trial counsel appears on the face of the record;” and further acknowledged that “it might be helpful to adopt a procedural rule that would allow the trial court to consider the claim and grant relief

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<sup>102</sup> *Shinn*, \_\_\_ U.S. at \_\_\_\_.

<sup>103</sup> *Id.* at \_\_\_\_\_. (Internal quotation marks omitted.)

<sup>104</sup> *Id.* at \_\_\_\_\_ (Sotomayor, J., dissenting).

before merits briefing in the direct appeal.”<sup>105</sup> The court referred this suggestion to the Criminal Procedure Rules Committee.

The question sometimes arises whether the procedural bar created by Rule 3.850(c)(7) applies when a defendant, having asserted a claim of ineffective assistance of counsel on direct appeal, then seeks to assert the same claim via collateral attack. The rule here is that “unless a direct appeal is affirmed with a written opinion that expressly addresses the issue of ineffective assistance of counsel, an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective assistance of counsel on a postconviction motion.”<sup>106</sup>

#### D. Untimely claims

A motion to vacate a sentence that exceeds the limits of the law may be filed at any time.<sup>107</sup> All other claims pursuant to Rule 3.850 must, as a general rule, be brought no more than

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<sup>105</sup> *Steiger*, 328 So. 3d at 932.

<sup>106</sup> *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002). *See also Blandin v. State*, 128 So. 3d 235 (Fla. 2d DCA 2013); *Allen v. State*, 100 So. 3d 747 (Fla. 2d DCA 2012). In *State v. Jackson*, 204 So. 3d 958 (Fla. 5<sup>th</sup> DCA 2016), the court explained that,

the scope of review on direct appeal differs from the scope of review for a Rule 3.850 post-conviction motion. A finding that [a defendant] did not show error apparent on the face of the record to obtain relief on direct appeal would not preclude a finding of ineffective assistance of counsel after an evidentiary hearing on a Rule 3.850 motion.

*Jackson*, 204 So. 3d at 962 (citing *Clarke v. State*, 102 So. 3d 763, 764-65 (Fla. 4<sup>th</sup> DCA 2012)).

<sup>107</sup> Fla. R. Crim. P. 3.850(b). A post-conviction claim can be brought outside the two-year limitation if “[t]he sentence imposed was illegal because it either exceeded the maximum or fell below the minimum authorized by statute for the criminal offense at issue.” Fla. Stat. §

two years after the challenged judgment or sentence became final.<sup>108</sup> A defendant's judgment and sentence become final when any direct review proceedings have concluded and jurisdiction returns to the post-conviction court.<sup>109</sup> When a defendant does not take a direct appeal of his judgment or sentence, the two-year time period begins to run 30 days after the trial court issues

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924.051(5)(c). *NB* that “[e]ither the state or the defendant may petition the trial court to vacate an illegal sentence at any time.” *Id.*

<sup>108</sup> *De Quesada v. State*, 289 So. 3d 26 (Fla. 3d DCA 2019), involved a claim pursuant to Rule 3.850 in which the claimant asserted that the charging document under which he was convicted was fundamentally defective. *De Quesada*, 289 So. 3d at 27. Although the claim was grossly untimely – Mr. de Quesada pleaded guilty in 2007, more than a decade before his post-conviction claim was brought – the appellate court took the position that when a charging document “wholly omits an essential element of the crime it is a defect that can be raised at any time.” *Id.* at 28 (quoting *Price v. State*, 995 So. 2d 401, 404 (Fla. 2008)). The *de Quesada* court is correct that such a defect can be raised at any time – but it cannot be raised by means of Rule 3.850 after the two-year limitation provided in the rule. In *Price*, upon which *de Quesada* relies, the defect was properly raised by petition for writ of *habeas corpus*. *Price*, 995 So. 2d at 403 (“Price filed . . . a petition for writ of *habeas corpus*, wherein he alleged that the information charging him with the crime was fatally defective”). See also *Figueroa v. State*, 84 So. 3d 1158 (Fla. 2d DCA 2012).

Note, however, that “[R]ule 3.050 allows a court, ‘for good cause shown,’ to extend the two-year deadline for filing postconviction motions under rule 3.850.” *State v. Boyd*, 846 So.2d 458, 460 (Fla. 2003). The *Boyd* court cites *In Re Estate of Goldman*, 79 So. 2d 846, 848 (Fla. 1955) as defining “good cause” in this context to mean, “a substantial reason, one that affords a legal excuse, or a cause moving the court to its conclusion, not arbitrary or contrary to all the evidence, and not mere ignorance of law, hardship on petitioner, and reliance on [another's] advice.”

<sup>109</sup> *Gland v. State*, 237 So. 3d 770, 772 (Fla. 2d DCA 2018) (“it is the conclusion of the direct appeal process, when jurisdiction to entertain a postconviction motion returns to the sentencing court, that starts the two-year time limitation on Rule 3.850”); *Lewis v. State*, 196 So. 3d 423 (Fla. 4<sup>th</sup> DCA 2016); *Mullins v. State*, 974 So. 2d 1135, 1137 (Fla. 3d DCA 2008). “[W]hen a defendant files a petition for writ of *certiorari* with the United States Supreme Court, th[e] two-year deadline commences when the Supreme Court denies the review of the petition.” *Hardin v. State*, 189 So. 3d 233, 234 (Fla. 2d DCA 2016) (citing *Huff v. State*, 569 So. 2d 1247, 1250 (Fla. 1990); *Davis v. State*, 953 So. 2d 612, 613 (Fla. 2d DCA 2007)).

its sentencing order.<sup>110</sup> “Absent proof otherwise, the date reflected on the certificate of service of a *pro se* inmate’s [post-conviction motion] is presumed to be the date on which the [motion] was filed.”<sup>111</sup>

A Rule 3.850 motion may be amended at any time prior to the post-conviction court’s ruling as long as the amended motion is filed within the two-year limitations period prescribed by the rule.<sup>112</sup> When a defendant files a motion requesting leave to amend before the post-conviction court rules and before the limitations period expires, the court must allow the amendment prior to adjudicating the motion.<sup>113</sup>

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<sup>110</sup> *Black v. State*, 750 So. 2d 162 (Fla. 3d DCA 2000).

<sup>111</sup> *Rosier v. State*, 144 So. 3d 604, 606 (Fla. 2d DCA 2014) (citing Fla. R. App. P. 9.420(a)(2); *Thompson v. State*, 761 So. 2d 324, 326 (Fla. 2000); *Jefferson v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 2d DCA Dec. 2, 2022) (citing *Haag v. State*, 591 So. 2d 614, 617 (Fla. 1992) for the proposition that a pleading “filed by a *pro se* inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state” such as prison officials); *Byram v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 1<sup>st</sup> DCA Dec. 14, 2022); *Curtis v. State*, 106 So. 3d 56, 57 (Fla. 2d DCA 2013)). “Where such a presumption arises, the burden shifts ‘to the State to prove that the document was not timely placed in prison officials’ hands for mailing’.” *Rosier*, 144 So. 3d at 606 (quoting *Thompson*, 761 So. 2d at 326). See also *Jefferson v. State*, 292 So. 3d 560 (Fla. 2d DCA 2020); *Simmons v. State*, 293 So. 3d 604 (Fla. 1<sup>st</sup> DCA 2020); *McDonald v. State*, 192 So. 3d 633 (Fla. 5<sup>th</sup> DCA 2016).

<sup>112</sup> *Brewster v. State*, 255 So. 3d 942 (Fla. 2d DCA 2018) (citing *Pritchett v. State*, 884 So. 2d 417, 418 (Fla. 2d DCA 2004)); *Prestano v. State*, 176 So. 3d 1280, 1281 (Fla. 5<sup>th</sup> DCA 2015) (citing *Kline v. State*, 858 So. 2d 1257, 1257 (Fla. 1<sup>st</sup> DCA 2003, in turn citing *Gaskin v. State*, 737 So. 2d 509, 518 (Fla. 1999)). See, e.g., *Harris v. State*, 192 So. 3d 685 (Fla. 5<sup>th</sup> DCA 2016). Cf. *Johnson v. State*, 247 So. 3d 698 (Fla. 1<sup>st</sup> DCA 2018) (because claim in amended motion did not relate back to original claim and amended motion was filed outside two-year period, amended motion was untimely).

<sup>113</sup> *Prestano*, 176 So. 3d at 1281 (Fla. 5<sup>th</sup> DCA 2015) (citing *Beard v. State*, 827 So. 2d 1021 (Fla. 2d DCA 2002)). See also *Andrews v. State*, 239 So. 3d 1290, 1290 n. 1 (Fla. 1<sup>st</sup> DCA 2018).

All the foregoing principles and time limitations have long been established and are – or were – entirely uncontroversial. The extent to which they have been upended by recent Florida constitutional amendments, however, is something that Florida courts will struggle mightily to determine in the years ahead. In November of 2018, Art. I § 16 of the state constitution was altered to include a host of “victims’ rights” provisions; notably, apropos post-conviction practice, the following:

All state-level appeals and collateral attacks on any judgment must be complete within two years from the date of appeal in non-capital cases and within five years from the date of appeal in capital cases, unless a court enters an order with specific findings as to why the court was unable to comply with this subparagraph and the circumstances causing the delay.<sup>114</sup>

How is this to be understood and applied in “the very torrent, tempest, and (as I may say) whirlwind”<sup>115</sup> of Florida appellate and post-conviction litigation? Is it to be taken literally? Is two years the total time permitted for direct appeal, plus post-conviction litigation at the trial level, plus post-conviction litigation at the appellate level? It is not at all uncommon or unreasonable for the direct appeal of a criminal trial to last two years, or close to two years. If a given appeal were to last two years, would that mean that there could be no post-conviction proceedings at all, because the two-year period provided by the constitutional amendment was entirely consumed by the direct appeal? In such a case, would it satisfy the requirement that the

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<sup>114</sup> Fla. Const. Art I § 16(b)(10)b. Subsection (b)(6)g also guarantees a putative victim’s “right to be informed of all post-conviction processes and procedures, [and] to participate in such processes and procedures.”

<sup>115</sup> William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, Act III sc. 2.

post-conviction court “enter[] an order with specific findings as to why the court was unable to comply with” the two-year limitation if the post-conviction court were simply to announce, “I was unable to comply with the two-year limitation period because the appellate court used up that two-year period on direct appeal, and I’m just getting this post-conviction claim now”? And if that isn’t sufficient, does it follow that a would-be post-conviction claimant thus situated could *never* bring his claim, because he couldn’t file it before the direct appeal was concluded and it was too late to file it after the direct appeal was concluded?

As a general rule, changes in substantive law are applied prospectively, but changes in procedural law may be applied retroactively.<sup>116</sup> Whether the newly-enacted two-year limitation on appellate-plus-post-conviction litigation is deemed substantive or procedural, however, common fairness suggests that it not be applied to a litigant already in the appellate or post-conviction pipeline. If, for example, a defendant was convicted at trial in December of 2016 and promptly took a direct appeal which was resolved against him in November or December of 2018, the new constitutional provisions should not be interpreted to bar him from thereafter filing and litigating an otherwise colorably meritorious post-conviction claim.

1. The exception to the two-year rule for newly-discovered evidence (herein of the

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<sup>116</sup> See, e.g., *Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986); *Merrill Lynch Tr. Co. v. Alzheimer's Lifeliners Ass'n*, 832 So. 2d 948, 952 (Fla. 2d DCA 2002) ("It is well-settled that statutory provisions that are substantive in nature may not be applied retroactively, while procedural provisions may be applied retroactively."); *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 692 (Fla. 5th DCA 2002) ("In the absence of clear legislative intent, a law affecting substantive rights is presumed to apply prospectively only while procedural or remedial statutes are presumed to operate retrospectively.")

doctrine of laches)

To plead a claim of newly-discovered evidence, a defendant convicted at trial has to allege that the demised evidence was unknown at the time of trial; that it could not have been discovered by the exercise of due diligence;<sup>117</sup> and that it is of such a nature as to likely produce an acquittal on retrial.<sup>118</sup> It was formerly the case that, to plead a claim of newly-discovered

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<sup>117</sup> The movant in *Ramirez v. State*, 319 So. 3d 85 (Fla. 3d DCA 2021) alleged to have discovered, more than a decade after his trial, that a serologist who testified against him had exaggerated her educational credentials. But “this information, if indeed true, could have been discovered long ago through a diligent request for available records.” *Ramirez*, 319 So. 3d at 86.

<sup>118</sup> Fla. Stat. § 924.051(6)(a); *Rogers v. State*, 327 So. 3d 784 (Fla. 2021); *McLin v. State*, 827 So. 2d 948 (Fla. 2002); *Jones v. State*, 709 So. 2d 512 (Fla. 1998); *Hartman v. State*, 325 So. 3d 922 (Fla. 5<sup>th</sup> DCA 2020); *Schofield v. State*, 311 So. 3d 918 (Fla. 2d DCA 2020); *Merritt v. State*, 68 So. 3d 936 (Fla. 3d DCA 2011). For this purpose, testimony is deemed “newly discovered” if it is the newly-available testimony of witnesses who were previously unwilling to testify, typically because of concerns about self-incrimination. *See, e.g., Baker v. State*, 310 So. 3d 1012, 1015 (Fla. 2d DCA 2020) (citing *Brantley v. State*, 912 So. 2d 342, 343 (Fla. 3d DCA 2005) (in turn quoting *Totta v. State*, 740 So. 2d 57, 58 (Fla. 4<sup>th</sup> DCA 1999))).

The second prong – that the evidence is of such a nature as to likely produce an acquittal on retrial – is satisfied if the evidence “weakens the case against [the defendant] so as to give rise to a reasonable doubt about his culpability.” *Jones*, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial. *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991).

In determining whether the evidence compels a new trial, the post-conviction court must consider all newly-discovered evidence that would be admissible and evaluate the weight of both that evidence and the evidence actually introduced at trial. *See gen’ly Melton v. State*, 193 So. 3d 881 (Fla. 2016). In *Cledenord v. State*, 247 So. 3d 545 (Fla. 4<sup>th</sup> DCA 2018), the court very usefully distinguished between the standard for evaluation of putatively newly-discovered evidence in the post-conviction context and the standard for evaluation of such evidence in other contexts – in *Cledenord*, that of a pretrial motion to suppress.

[T]he trial court should not have applied the post-conviction standard for newly discovered evidence in ruling on appellant’s request for reconsideration of the trial court’s suppression ruling. The post-conviction standard is too restrictive in the pretrial

evidence, a defendant convicted upon his plea of guilty (or no contest) had to allege that the evidence was unknown; that it could not have been discovered by the exercise of due diligence; and that withdrawal of the plea is necessary to correct a manifest injustice.<sup>119</sup> The locution “manifest injustice” was borrowed from the jurisprudence dealing with withdrawals of pleas after sentencing.<sup>120</sup> At the time that *Scott* was authored, Fla. R. Crim. P. 3.170 made explicit provision for the withdrawal of a plea before, but not after, sentencing. At present, Rule 3.170(l) provides that a plea may be withdrawn within 30 days after the imposition of sentence upon any of the grounds set forth in Fla. R. App. P.

9.140(b)(2)(A)(ii)(a)–(e), viz., that the trial court lacked subject matter jurisdiction; that there was a violation of the plea agreement; that the plea was involuntary; that there was a sentencing error; or as otherwise provided by law. The use of the borrowed term “manifest injustice” as a means of evaluating claims of newly discovered evidence by defendants who were convicted by plea rather than by trial is unsatisfactory in many ways. It has, notably, been seized upon by *pro*

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context, as it is inconsistent with a trial court’s broad discretion to reconsider a prior interlocutory ruling on a motion to suppress. The due diligence prong of the post-conviction standard serves the policy of finality, but that policy has little importance before trial.

*Cledenord*, 247 So. 3d at 549.

<sup>119</sup> *Berry v. State*, 175 So. 3d 896, 897 (Fla. 3d DCA 2015); *Miller v. State*, 814 So. 2d 1131 (Fla. 5th DCA 2002); *Scott v. State*, 629 So. 2d 888 (Fla. 4th DCA 1993); *Bradford v. State*, 869 So. 2d 28 (Fla. 2d DCA 2004).

<sup>120</sup> *See Scott*, 629 So. 2d at 890 (citing *Williams v. State*, 316 So. 2d 267 (Fla. 1975)). *See also Tubbs v. State*, 229 So. 3d 1256 (Fla. 1<sup>st</sup> DCA 2017).

se litigants who mistakenly view any bald allegation of “manifest injustice” as sufficient to defeat, for all purposes and in all contexts, the two-year limitation of Fla. R. Crim. P. 3.850(b). That is not the case.<sup>121</sup>

In *Long v. State*,<sup>122</sup> the Florida Supreme Court receded from the language of “manifest injustice” and supplanted it with the requirement that a movant “demonstrate a reasonable probability that, but for the newly discovered evidence, the [movant] would not have pleaded guilty and would have insisted on going to trial.”<sup>123</sup> What is required is more than a naked allegation by the movant that he would have prevailed at trial had he been possessed of the newly-discovered evidence. The post-conviction court is to consider “the strength of the government’s case against the defendant ... in evaluating whether the” newly discovered evidence would have been outcome-determinative.<sup>124</sup> *Long* says nothing about the “manifest injustice” standard, or the reason that standard is jettisoned in favor of a new one. To the extent, however, that the test announced in *Long* is intended to eliminate the use of “manifest injustice” in this

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<sup>121</sup> See discussion *infra* at II. D. 5.

<sup>122</sup> 183 So. 3d 342 (Fla. 2016).

<sup>123</sup> *Long*, 183 So. 3d at 346. *Long* involved a claim brought pursuant to Rule 3.851, not 3.850; but for this purpose there should be no difference. See also *Williams v. State*, 255 So. 3d 464, 467 n. 1 (Fla. 3d DCA 2018).

<sup>124</sup> *Long*, 183 So. 3d at 345. See also *Perez v. State*, 240 So. 3d 125 (Fla. 3d DCA 2018); *Perez v. State*, 212 So. 3d 469 (Fla. 3d DCA 2017).

context entirely, it can serve only to promote clarity (even when it does not result in different outcomes).<sup>125</sup>

Seldom mentioned in the appellate opinions – perhaps because it is or should be self-evident – is the requirement that the post-conviction court determine that the newly-discovered evidence would actually be admissible at a retrial.<sup>126</sup> Post-conviction proceedings are conducted in the absence of a jury; the post-conviction judge sits as trier of both law and fact. In such circumstances there may be a tendency for the judge to relax foundational evidentiary requirements. When a claim of newly-discovered evidence is at issue, this tendency must be resisted. No matter how probative and persuasive a newly-discovered evidentiary artifact may be, if the proponent cannot demonstrate the technical admissibility of the evidence at retrial, his claim must fail.<sup>127</sup> The post-conviction movant in *Aguirre-Jarquin v. State*<sup>128</sup> sought relief on the basis of newly-discovered evidence, such evidence including “affidavits from several ... individuals stating that Samantha [Williams] told them that she killed her mother and

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<sup>125</sup> It will be no small task to purge the expression “manifest injustice” from the post-conviction jurisprudence of Florida. See discussion *infra* at II. D. 5.

<sup>126</sup> *Dailey v. State*, 279 So. 3d 1208, 1213 (Fla. 2019) (“regardless of whether ‘the evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted’ unless the evidence would be admissible at trial”) (quoting *Sims v. State*, 754 So. 2d 657, 660 (Fla. 2000)); *Schofield v. State*, 67 So. 3d 1066 (Fla. 2d DCA 2011).

<sup>127</sup> See, e.g., *Sochor v. State*, 246 So. 3d 195 (Fla. 2018); *State v. Boughs*, 220 So. 3d 1280, 1281 (Fla. 5<sup>th</sup> DCA 2017) (Berger, J., dissenting).

<sup>128</sup> 202 So. 3d 785 (Fla. 2016).

grandmother,”<sup>129</sup> *i.e.*, that she killed those persons for whose deaths Aguirre-Jarquin had been convicted and sentenced. The prosecution argued, and the post-conviction court concluded, that Ms. Williams’s statements were hearsay in the mouths of the affiants and would thus be inadmissible at any retrial of Aguirre-Jarquin.<sup>130</sup> The Florida Supreme Court was at pains to demonstrate the admissibility of the putative hearsay, however, giving extended discussion to the due process limitations on the hearsay rule imposed by the United States Supreme Court in *Chambers v. Mississippi*.<sup>131</sup>

In *Nordelo v. State*<sup>132</sup> the Florida Supreme Court quoted with approval the following language from Judge Cope’s dissent below:

The *Davis* [*v. State*, 26 So. 3d 519, 526 (Fla. 2009)] court explained that there is an important distinction between the requirements (a) to plead the existence of newly discovered evidence, versus (b) the heightened requirements to establish due diligence during an evidentiary hearing. The pleading requirement is lower; the proof requirement is higher.<sup>133</sup>

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<sup>129</sup> *Aguirre-Jarquin*, 202 So. 3d at 790.

<sup>130</sup> *Id.* at 793 (“The State also argues (and the circuit court ruled) that Samantha’s statements should not factor into our analysis because they would be inadmissible in a new trial”). *See also Suggs v. State*, 238 So. 3d 699 (Fla. 2017).

<sup>131</sup> 410 U.S. 284 (1973). *See Aguirre-Jarquin*, 202 So. 3d at 793 *et. seq.* *See also*, regarding the admissibility of evidence in this context, *LaMore v. State*, 303 So. 3d 261 (Fla. 2d DCA 2020); *DeJesus v. State*, 302 So. 3d 472 (Fla. 2d DCA 2020).

<sup>132</sup> *Nordelo v. State*, 93 So. 3d 178 (Fla. 2012).

<sup>133</sup> *Nordelo*, 93 So. 3d at 182 (quoting *Nordelo v. State*, 47 So. 3d 854, 861 (Fla. 3d DCA 2010) (Cope, J., dissenting)). *See also Joe v. State*, 305 So. 3d 561 (Fla. 4<sup>th</sup> DCA 2020).

That being the case, the rule of Fla. R. Crim. P. 3.850(f)(2) and *Spera v. State*,<sup>134</sup> obliging the post-conviction court to afford a movant a reasonable opportunity to re-plead a technically deficient claim, has been applied to claims of newly-discovered evidence. The defendant in *Fletcher v. State*<sup>135</sup> was convicted of murder and armed robbery in 1995.<sup>136</sup> He filed, within the two-year period provided by the rule, a post-conviction motion claiming ineffective assistance of counsel, the ineffectiveness being his trial attorney's failure to call one Jerry Rigsby as a defense witness.<sup>137</sup> The post-conviction motion was denied on the grounds that Fletcher "had made no showing that Rigsby would have been available to offer admissible testimony."<sup>138</sup>

In 2009, Fletcher filed another post-conviction claim, this time alleging newly-discovered evidence, the evidence consisting of what purported to be an affidavit signed by Rigsby.<sup>139</sup> The affidavit provided ample exculpatory detail, and offered an explanation for Rigsby's absence at trial: "In April 1995, Rigsby moved to England and lost contact with Defendant – until October 2008, when he received a message on MySpace from a friend of Defendant who told him Defendant was trying to get in touch with him."<sup>140</sup>

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<sup>134</sup> *Spera v. State*, 971 So. 2d 754 (Fla. 2007).

<sup>135</sup> *Fletcher v. State*, 53 So. 3d 1249 (Fla. 4th DCA 2011).

<sup>136</sup> *Fletcher*, 53 So. 3d at 1250.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1250-51.

<sup>140</sup> *Id.* at 1251.

The principal problem with Rigsby’s affidavit was its form. “Below Rigsby’s signature was that of a solicitor who confirmed that Rigsby had signed the statement in the solicitor’s presence, with a stamp indicating the solicitor was ‘authorised’ to administer oaths, but nothing on the page indicated that an oath had been administered to Rigsby.”<sup>141</sup> The court of appeal, however, acknowledged that it had applied *Spera* “to insufficient claims of newly discovered evidence,”<sup>142</sup> and remanded to the post-conviction court with instructions to “strike the motion with leave to refile ... with a properly sworn affidavit, within a reasonable time period, pursuant to *Spera*.”<sup>143</sup>

The post-conviction claim in *Smith v. State*<sup>144</sup> “was based on newly discovered evidence of juror misconduct that came to light *fifteen years* after [Smith] was found guilty and convicted of sexual battery.”<sup>145</sup> Apparently a juror had concealed during jury selection that she had herself

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1252 (citing *Slade v. State*, 10 So. 3d 1205 (Fla. 4th DCA 2009)).

<sup>143</sup> *Id.* at 1252. See also *Morgan v. State*, 303 So. 3d 278 (Fla. 1<sup>st</sup> DCA 2020). Regarding what constitutes a sufficiently-pleaded oath in this context, see *Wilson v. State*, 202 So. 3d 135 (Fla. 2d DCA 2016). In *Himes v. State*, 310 So. 3d 542 (Fla. 1<sup>st</sup> DCA 2021), Himes’s post-conviction claim was supported by an affidavit subscribed to by one Tyson, formerly a suspect in the crime for which Himes was convicted. “Tyson claimed that he, not Himes, was the getaway driver in the robbery and that Himes was not involved.” *Himes*, 310 So. 3d at 544. But Tyson’s affidavit, although notarized, “was not made under penalty of perjury, nor did the notary indicate how Tyson was known to her.” *Id.* These technical shortcomings rendered Tyson’s affidavit, and therefore Himes’s motion, inadequate. Himes was, however, entitled to “a single chance to amend [his] motion, including [the] insufficient affidavit.” *Id.*

<sup>144</sup> 283 So. 3d 1276 (Fla. 5<sup>th</sup> DCA 2019).

<sup>145</sup> *Smith*, 283 So. 3d at 1276 (emphasis added).

been the victim of sexual crimes as a child, although she had been questioned in voir dire on that very issue. Her concealment came to light “when a local newspaper published a Letter to the Editor purportedly written by the same juror, which may have contradicted her answers” given in voir dire.<sup>146</sup> This was a sufficient basis at least to require an evidentiary hearing.

If a newly-discovered evidence claim is based on the testimony of a long-lost witness, or a recanting trial witness, Rule 3.987(6) provides that:

Claims of newly discovered evidence must be supported by affidavits attached to [the] motion. If [the] newly discovered evidence claim is based on recanted trial testimony or a newly discovered witness, the attached affidavit must be from that witness. For all other newly-discovered evidence claims, the attached affidavit must be from any person whose testimony is necessary to factually support [the] claim for relief. If the required affidavit is not attached to [the] motion, [the movant] must provide an explanation why the required affidavit could not be obtained.

Of course the testimony of a long-lost witness is by no means the only form that newly discovered evidence can take.<sup>147</sup> The post-conviction claimant in *Murphy v State*<sup>148</sup> was tried and

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<sup>146</sup> *Id.* at 1277.

<sup>147</sup> Regarding the credibility problems often associated with affidavits supplied by such long-lost witnesses, and the notion of “inherent incredibility,” *see infra* at IV. Recanted testimony that is alleged to constitute newly discovered evidence will justify a new trial only if the court is satisfied that the recantation is true, and that the recanted testimony would probably result in a different outcome. *Ferguson v. State*, 306 So. 3d 985 (Fla. 3d DCA 2020); *Morris v. State*, 275 So. 3d 230, 234 (Fla. 1<sup>st</sup> DCA 2019) (citing *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009)). Note, too, that the recantation of trial witnesses when offered as newly-discovered evidence is always viewed skeptically. *See, e.g., Borders v. State*, 330 So. 3d 1016 (Fla. 5<sup>th</sup> DCA 2021); *Lightner v. State*, 306 So. 3d 1083, 1086 (Fla. 3d DCA 2020) (“A recantation will not be considered newly discovered evidence where the recantation offers nothing new or where the recantation is offered by an untrustworthy individual who gave inconsistent statements all along”); *Mansfield v. State*, 204 So.3d 14 (Fla. 2016); *Ramos v. State*, 264 So. 3d 180, 181 (Fla.

convicted in 1996, his conviction being based in part on expert testimony as to comparative bullet-lead analysis.<sup>149</sup> In 2007, Murphy learned from articles in the popular press that the National Academy of Sciences had concluded that comparative bullet-lead analysis lacked an adequate scientific foundation.<sup>150</sup> This constituted newly discovered evidence, sufficient to justify Murphy in bringing a post-conviction claim well outside the two-year period.<sup>151</sup>

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4<sup>th</sup> DCA 2019); *Gorman v. State*, 260 So. 3d 1196, 1198 (Fla. 1<sup>st</sup> DCA 2019); *Barros v. State*, 254 So. 3d 1186 (Fla. 5<sup>th</sup> DCA 2018); *Ruth v. State*, 207 So. 3d 970 (Fla. 1<sup>st</sup> DCA 2016); *John v. State*, 98 So. 3d 1257, 1261 (Fla. 3d DCA 2012) (“Recanted testimony is ‘exceedingly unreliable’”) (quoting *Bell v. State*, 90 So. 2d 704, 704 (Fla. 1956)). *See also Miller v. State*, 814 So. 2d 1131 (Fla. 5<sup>th</sup> DCA 2002). *But cf. Johnson v. State*, 313 So. 3d 894 (Fla. 2d DCA 2021); *State v. Corner*, 84 So. 3d 358 (Fla. 4<sup>th</sup> DCA 2012).

<sup>148</sup> *Murphy v. State*, 24 So. 3d 1220 (Fla. 2d DCA 2009).

<sup>149</sup> *Murphy*, 24 So. 3d at 1221.

<sup>150</sup> *Id.* at 1221, 1224 n. 1.

<sup>151</sup> In April, 2015, the FBI acknowledged far-reaching flaws and defects as to “microanalysis of hair” testimony which its forensic personnel had offered over the course of decades. *See, e.g.*, [http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310\\_story.html](http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html). *See also United States v. Watson*, 792 F.3d 1174 (9<sup>th</sup> Cir. 2015) (new method of DNA analysis renders previously untestable evidence newly discovered). *See gen’ly Rivera v. State*, 187 So. 3d 822 (Fla. 2015); *Vega v. State*, 288 So. 3d 1252, 1257 (Fla. 5<sup>th</sup> DCA 2020) (“recent medical studies, reports, and articles – not available at the time of trial – have been held to constitute newly discovered evidence”) (citing *Clark v. State*, 995 So. 2d 1112, 1113 (Fla. 2d DCA 2008)). *See also Rosado v. State*, 267 So. 3d 4, 5 (Fla. 4<sup>th</sup> DCA 2019).

Conversely, *see Schwab v. State*, 969 So. 2d 318, 325-26 (Fla. 2007) (“[T]his Court has not recognized ‘new opinions’ or ‘new research studies’ as newly discovered evidence”); *see also Davis v. State*, 142 So. 3d 867 (Fla. 2014); *Branch v. State*, 236 So. 3d 981 (Fla. 2018).

But compare *Maryland v. Kulbicki*.<sup>152</sup> At Kulbicki’s state-court trial in 1995, an FBI agent offered “testimony of the sort [that comparative bullet-lead analysis] experts had provided for decades.”<sup>153</sup> Years later, Kulbicki brought a post-conviction claim alleging that comparative bullet-lead analysis no longer had the general support of the scientific community.<sup>154</sup>

At issue in *Kulbicki*, however, was not whether scientific progress constituted newly discovered evidence for purposes of a statute of repose that made an exception for newly discovered evidence. Kulbicki argued instead that his trial lawyers should have anticipated the change in scientific thought and acted accordingly; that his “defense lawyers were constitutionally required to predict the demise of” comparative bullet-lead analysis.<sup>155</sup> This position – very different from that of *Murphy, supra* – the Court rejected. Post-conviction claims are to be evaluated according to “the rule of contemporary assessment of counsel’s conduct,”<sup>156</sup> *i.e.*, the post-conviction court is to determine whether trial counsel’s representation measured up to the Plimsoll line<sup>157</sup> of the Sixth Amendment by the standards that obtained at the time that

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<sup>152</sup> 136 U.S. 2 (2015).

<sup>153</sup> *Kulbicki*, 136 U.S. at 2.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 4.

<sup>156</sup> *Id.* (quoting *Lockhard v. Fretwell*, 506 U.S. 364, 372 (1993)).

<sup>157</sup> See *Fikes v. Alabama*, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring). See also <http://oceanservice.noaa.gov/facts/plimsoll-line.html>.

representation was rendered. Trial counsel is not ineffective for failing to know what other lawyers do not presently know, but future lawyers will.

Defendant and co-defendant in *Farina v. State*<sup>158</sup> were equally culpable. Farina was sentenced to death; subsequent to affirmance of that sentence, the co-defendant was sentenced to life imprisonment.<sup>159</sup> Ordinarily, this after-imposed life sentence would constitute newly-discovered evidence as to Farina.<sup>160</sup> In that case, however, the life sentence was imposed on the co-defendant, not based on the nature and circumstances of the crime or like-kind factors, but as a matter of law: the co-defendant was a juvenile and ineligible for the death penalty.<sup>161</sup> Such a legal restriction did not constitute newly-discovered evidence as to Farina.<sup>162</sup> Similarly, the post-conviction claimant in *Walton v. State*<sup>163</sup> alleged that the re-sentencing of his co-defendant Cooper to a life sentence would probably result in a life sentence for Walton on retrial. He further alleged that the post-conviction court erred in adjudicating his claim because it did not

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<sup>158</sup> *Farina v. State*, 937 So. 2d 612 (Fla. 2006).

<sup>159</sup> *Farina*, 937 So. 2d at 619.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 619-20.

<sup>162</sup> *Id.* See also *Nelson v. State*, 73 So. 3d 77, 91 (Fla. 2011) (“In this case, the life sentence of [the co-defendant] as a matter of law does not constitute newly-discovered evidence for Nelson because [the co-defendant’s] ineligibility for the death penalty stemmed from his ineligibility *as a matter of law* – not from the circumstances that surrounded the homicide or [the co-defendant’s] character”); *State v. Midkiff*, 302 So. 3d 435 (Fla. 5<sup>th</sup> DCA 2020); *Profetto v. State*, 198 So. 3d 684 (Fla. 2d DCA 2015).

<sup>163</sup> 246 So. 3d 246 (Fla. 2018).

consider intervening changes in law as part of the cumulative analysis, *viz.*, the analysis of the trial evidence coupled with the newly-discovered evidence.<sup>164</sup> But consideration of intervening changes in law forms no part of the evaluation of newly-discovered evidence. The retroactivity of newly-established legal rights is assessed according to the standard of *Witt v. State*.<sup>165</sup> “Viewing decisional changes in the law as newly discovered ‘facts’ would erase the need for a retroactivity analysis pursuant to *Witt*.”<sup>166</sup>

Compare *Aguirre v. State*.<sup>167</sup> Aguirre was charged with violating his probation by committing a new offense.<sup>168</sup> His cases were resolved by plea, pursuant to which the trial court imposed a 15-year sentence for the probation violation and a consecutive five-year sentence for the new crime. The plea agreement contemplated, however, that Aguirre would be permitted to surrender to serve his time at a future date; and that if he returned to court at the demised date and time, his sentence would be mitigated to 35.85 months.<sup>169</sup> While Aguirre was at liberty, however, he was charged with a new burglary. As a consequence, he did not receive the mitigated sentence.<sup>170</sup>

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<sup>164</sup> *Walton*, 246 So.3d at 250.

<sup>165</sup> 387 So.2d 922 (Fla. 1980). *See* discussion at II. D. 2, *infra*.

<sup>166</sup> *Walton*, 246 So.3d at 252.

<sup>167</sup> 207 So. 3d 244 (Fla. 4<sup>th</sup> DCA 2016).

<sup>168</sup> *Aguirre*, 207 So. 3d at 244.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

A year later, the trial court granted a motion to suppress statements allegedly made by Aguirre in connection with his burglary arrest.<sup>171</sup> The basis for the suppression order was the court's determination that the initial stop leading to Aguirre's arrest was illegal, and that the statements were the fruit of that primary illegality.<sup>172</sup> The appellate court affirmed the suppression order, and the prosecution ultimately dismissed the burglary charge.<sup>173</sup> Aguirre then sought relief pursuant to Rule 3.850 from the sentence imposed at his probation hearing, arguing that the subsequent dismissal of the burglary charge constituted newly-discovered evidence as to the violation of probation.<sup>174</sup> The appellate court agreed, observing that, "evidence which develops after a [probation violation] hearing can support a post-conviction claim of newly discovered evidence, and a defendant can be entitled to a new [probation violation] hearing when the new evidence would probably produce a different result."<sup>175</sup> In the same vein, an order vacating a conviction that served as a predicate for the imposition of a habitual offender sentence qualifies as newly-discovered evidence.<sup>176</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 244-45.

<sup>173</sup> *Id.* at 244.

<sup>174</sup> *Id.* at 245.

<sup>175</sup> *Id.* (citing *Ware v. State*, 159 So. 3d 192, 195 (Fla. 1<sup>st</sup> DCA 2015)).

<sup>176</sup> *Sadler v. State*, 141 So. 3d 1266, 1268 (Fla. 1<sup>st</sup> DCA 2014) (citing *Wilson v. State*, 857 So. 2d 964, 965 (Fla. 1<sup>st</sup> DCA 2003)).

As noted *supra*, however, perhaps the most common – certainly the most entertaining – form of newly-discovered evidence offered in support of motions brought pursuant to Rule 3.850 is that of the long-lost witness. The following example, far from being remarkable, is commonplace in Florida post-conviction practice:

Mr. Thomas alleges that, 21 ½ years after the fact, he happened, by sheer serendipity, to meet in the correctional facility in which he was then housed a fellow inmate who was an eye witness to the crime for which Thomas was convicted and who had a clear recollection of Thomas’s innocence. Exhibiting an unexampled gift for understatement, Mr. Thomas summarizes this remarkable encounter as follows: “What a coincidence.” (Tr. of hr’g of July 19, 2012, [hereinafter “Tr.”] 78.)

Of course there is a grain of wisdom in the aphorism, “Strange are the coincidences of truth.” That Mr. Thomas’s strange encounter seems improbable does not make it impossible; that it seems too good to be true does not make it false; that it seems contrived does not make it a contrivance. But just as I am rightly admonished not to be credulous when confronted with inculpatory police testimony that is dubious on its face, *see State v. Ruiz*, 50 So. 3d 1229 (Fla. 4th DCA 2011), so I would be rightly admonished not to be credulous when confronted with exculpatory fellow-inmate testimony that is dubious on its face.<sup>177</sup>

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<sup>177</sup> *State v. Thomas*, Case No. F90-44628 (Fla. 11th Cir. Ct. Oct. 1, 2012) (Hirsch, J.). *See also Sinclair v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 1<sup>st</sup> DCA Dec. 20, 2022). *Cf. Coley v. State*, 74 So. 3d 184, 185-86 (Fla. 2d DCA 2011) (Altenbernd, J., concurring):

This is one of those post-conviction cases in which the defendant happens by odd coincidence to find a very favorable witness, who just happens to be serving time in the same prison where he is serving his sentence. Although the witness ... did not come forward in 1998, he was willing to provide his testimony under oath in 2008.

Given that improbable events occur in our lives with some

The reason for the requirement that a post-conviction movant possessed of what he claims to be newly-discovered evidence demonstrate that the evidence could not have been discovered at the time of trial or plea by the exercise of due diligence is so apparent that it is seldom stated. In *People v. Schmidt*<sup>178</sup> then-Judge Cardozo explained:

The defense now offered by the defendant was not discovered since the trial. It was known to him ... from the beginning. He chose to withhold it, because he had faith in his ability to deceive the courts of justice. We do not attempt to determine how much of his present tale is true. Even if the entire tale is true, the courts are powerless to help him. A criminal may not experiment with one defense, and then when it fails him, invoke the aid of the law which he has flouted, to experiment with another defense, held in reserve for that emergency. It would be strange if any system of law were thus to invite contempt of its authority.<sup>179</sup>

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frequency, we cannot reject this claim as a matter of law. In the event that the trial court concludes after an evidentiary hearing that the improbability of these event is not generated by coincidence, but rather by perjury, the trial court will have options available to it that should be sufficient to address its concerns.

<sup>178</sup> 216 N.Y. 324 (N.Y. 1915). *Schmidt* involved a post-sentencing motion for a new trial, rather than a collateral attack on the judgment and sentence. The principle at issue, however, is the same.

<sup>179</sup> *Schmidt*, 216 N.Y. at 328-29 (internal quotation omitted). And see H. C. Underhill, A Treatise on the Law of Criminal Evidence (1898) § 517, at p. 580-81:

The reasons for requiring the exercise of diligence by the accused in this connection are obvious. If the existence and the character of the evidence were known to him while his trial was pending, and if he could have procured it in season by the exercise of diligence, it was his duty to do so at the earliest opportunity. A person indicted for a crime and on trial cannot be allowed to speculate upon the outcome of his trial and to hold back evidence which he may easily procure, with the hope and expectation that, should the proof

Collateral attacks on criminal convictions brought pursuant to Rule 3.850 are civil claims, heard by criminal courts in the exercise of their ancillary jurisdiction.<sup>180</sup> As such, the civil-law doctrine of laches is applicable to such claims.<sup>181</sup> And it is applicable separately and apart from the two-year time limitation imposed by Rule 3.850. “[L]aches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced.”<sup>182</sup> “[T]he doctrine of laches has been applied to bar a collateral relief proceeding when, from the face of the petition, it is obvious that the state has been manifestly prejudiced and no reason for an extraordinary delay has been provided.”<sup>183</sup>

John Jules entered a negotiated plea of guilty to multiple charges in 1995 and was sentenced to a prison term.<sup>184</sup> As part of the change-of-plea colloquy, the judge asked Jules if he

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against him be more convincing than he anticipates, he can put the state to the additional expense of another trial, at which the evidence that he has [withheld] can be introduced.

<sup>180</sup> *State v. Weeks*, 166 So. 2d 892, 893, 894-95 (Fla. 1964); *Grange v. State*, 199 So. 3d 440, 442 (Fla. 4<sup>th</sup> DCA 2016) (citing *Jones v. State*, 69 So. 3d 329 (Fla. 4<sup>th</sup> DCA 2011)).

<sup>181</sup> *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997) (citing *Anderson v. Singletary*, 688 So. 2d 462, 463 (Fla. 4<sup>th</sup> DCA 1997)); *Xiques v. Dugger*, 571 So. 2d 3 (Fla. 2d DCA 1990); *Smith v. Wainwright*, 425 So. 2d 618 (Fla. 2d DCA 1982); *Remp v. State*, 248 So. 2d 677 (Fla. 1<sup>st</sup> DCA 1970).

<sup>182</sup> *Homberg v. Armbrrecht*, 327 U.S. 392, 396 (1964) (quoting *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892)).

<sup>183</sup> *McCray*, 699 So. 2d at 1368. See also *Wright v. State*, 711 So. 2d 66, 68 (Fla. 3d DCA 1998); *Hurtado v. Singletary*, 708 So. 2d 974, 975 (Fla. 3d DCA 1998).

<sup>184</sup> *Jules v. State*, 233 So. 3d 1196, 1197 (Fla. 3d DCA 2017).

was a U.S. citizen; Jules replied that he was.<sup>185</sup> In point of fact he was a lawful permanent resident but not a citizen. Whether he was merely mistaken or was deliberately deceiving the court is not clear.

Jules was released from custody in 2001, there being no immigration detainer for him.<sup>186</sup> In 2003 and again in 2014 he was approved for renewal of his legal permanent resident status.<sup>187</sup> In 2008 and 2009 he traveled to and from the Bahamas without incident.<sup>188</sup> But in 2015, as he attempted to return from Turks and Caicos, Jules was detained by immigration authorities and informed that his 1995 conviction subjected him to deportation. He then sought to vacate his judgment and sentence pursuant to Rule 3.850, claiming that his plea was involuntary because he had never been informed of its deportation consequences.<sup>189</sup> Regarding the obvious untimeliness of his claim, Jules alleged that the fact of his 2015 detention constituted newly-discovered evidence – it was the first time he had ever been given any reason to believe he might be subject to deportation – and that his post-conviction claim was brought within two years of the discovery of that evidence.<sup>190</sup>

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<sup>185</sup> *Jules*, 233 So. 3d at 1197.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1198.

The exception to the two-year time limitation for newly-discovered evidence was unavailable to Mr. Jules, however, because he had failed to exercise that due diligence that the exception requires, *i.e.*, he failed to show that the fact that his plea would render him deportable could not, by the exercise of due diligence, have been known to him at the time of his plea. The *Jules* court cited *State v. Green*<sup>191</sup> for the proposition that a defendant who, like Jules, learns for the first time of the deportation consequences of his plea when deportation proceedings are instituted against him has not made out a claim of newly-discovered evidence for purposes of Rule 3.850. The defendant is obliged to show that he exercised due diligence at the time of his plea – even if, as may well have been the case with Jules, he believed that he had no reason to do so.

Undoubtedly the result in *Jules* was correct: Mr. Jules was entitled to no relief. But the presence or absence of that diligence required by Rule 3.850(b)(1) is distinctly a question of fact. Did Mr. Jules consult his attorney regarding the deportation consequences of his plea? What was his attorney's advice? Did he consult an attorney specializing in immigration practice? What was that attorney's advice? Without the answers to these and many like-kind questions, it is simply impossible to say whether or not Jules was sufficiently diligent.

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<sup>191</sup> 944 So. 2d 208 (Fla. 2006). *See also* *Wallace v. State*, 264 So. 3d 389, 392 (Fla. 5<sup>th</sup> DCA 2019); *State v. Lorenzo*, 271 So. 3d 77, 78-79 (Fla. 3d DCA 2019).

And of course the diligence to which Rule 3.850(b)(1) refers is diligence exercised at, or immediately prior to, the time of plea or trial. A failure of diligence after the fact of the plea or trial would be irrelevant to the analysis under the rule.

Although it makes no express reference to the doctrine of laches, perhaps the *Jules* opinion is best understood by reference to that doctrine. Whether or not Mr. Jules made sufficient inquiries regarding the deportation consequences of his plea agreement at the time he entered into that plea agreement, it appears that he made no inquiries thereafter – not even on the two occasions when he sought the renewal of his legal permanent resident status. When, 20 years after that agreement was accepted by the court, Jules sought post-conviction relief, the predicate for a prosecution assertion of the doctrine of laches was amply made out: no justification for extraordinary delay was presented, and prejudice to the prosecution was manifest. As was said of the post-conviction claimant in *Wright v. State*,<sup>192</sup> Jules’s “lack of due diligence is apparent in that he did not bring this claim until 24 years” – in Jules’s case, 20 years – “after his sentencing. The prejudice to the State is likewise apparent as court transcripts are routinely destroyed after ten years and the State now has no transcript in existence to refute, or prove, Wright’s claim.”<sup>193</sup>

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<sup>192</sup> *Wright*, 711 So. 2d at 68. See also *Hurtado*, 708 So. 2d at 975 (delay of eight years “is unreasonable” and “the prejudice is obvious”).

<sup>193</sup> Similar to *Jules* is *State v. Decker*, 311 So. 3d 327 (Fla. 5<sup>th</sup> DCA 2021). Karen Decker entered into a plea agreement, allegedly relying on her lawyer’s assurance that she would be able to seal her record. She made no attempt to do so, however, until three years later, “when an apartment complex denied her residency because of her criminal record.” *Decker*, 311 So. 3d at 328. And when she moved to seal, she learned that the crime to which she had pleaded no

The diligence inquiry under Rule 3.850(b)(1) looks at a single juncture in time: the point at which the defendant took his plea or went to trial. The diligence inquiry when there is an assertion of laches looks at the entirety of the defendant’s litigation history.

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“Although an evidentiary hearing is not a prerequisite” to adjudicating a facially-sufficient claim of newly discovered evidence,<sup>194</sup> “an evidentiary hearing is the general rule rather than the exception’.”<sup>195</sup> A post-conviction court may be able to dispense with a hearing on a claim of newly discovered evidence, however, when “the affidavit is inherently incredible or obviously immaterial to the verdict and sentence.”<sup>196</sup> The defendant in *Placide v. State*<sup>197</sup> was convicted in 1992.<sup>198</sup> In 2014 he filed a motion under Rule 3.850 claiming newly discovered

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contest was not one as to which sealing was available. She then moved – five years after the fact – to vacate her plea and sentence. *Id.* at 328. But “Decker could [have] identif[ied] the legal impact of her plea at the time of entry.” *Id.* at 329. “Decker’s statutory ineligibility for sealing is a legal consequence of her plea that was always readily discoverable.” *Id.* at 330. Like Jules, she was insufficiently diligent and was therefore not entitled to relief outside the two-year period.

<sup>194</sup> *Floyd v. State*, 202 So. 3d 137, 140 (Fla. 2d DCA 2016).

<sup>195</sup> *Floyd*, 202 So. 3d at 140 (quoting *Rolack v. State*, 93 So. 3d 450, 452 (Fla. 3d DCA 2012)).

<sup>196</sup> *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009); *McLin v. State*, 827 So. 2d 948, 955 (Fla. 2002). *See also Andrews v. State*, 919 So. 2d 552, 553 (Fla. 4th DCA 2005).

<sup>197</sup> 189 So. 3d 810 (Fla. 4th DCA 2015).

<sup>198</sup> *Placide*, 189 So. 3d at 812.

evidence, the evidence in question being the affidavit of a “family friend, Marie Blackwell.”<sup>199</sup>

Rejecting Blackwell’s affidavit, and the motion it supported, as inherently incredible, the Fourth

District wrote:

Blackwell asserts that she witnessed jurors discussing the case in 1992 and that one juror allegedly expressed the belief that the defendant was guilty ... because he was shackled. ... Blackwell alleges she did not report this to anyone until 2013 when she happened to be at Placide’s house when his family was discussing the shackling issue. Blackwell states she did not come forward sooner because she allegedly did not know it was improper for the jurors to have this discussion. We are asked to believe that she thought it was appropriate for jurors to prejudge a defendant’s guilt

... . Blackwell asserts that she did not report the conversation to the judge, because she thought she would get in trouble for speaking in [Placide’s] defense. This does not explain, however, why she would not have revealed this information to Placide’s trial counsel or to Placide or Placide’s family members in the twenty-plus years that followed. The circumstances are simply beyond what any reasonable person could accept as credible.<sup>200</sup>

Compare *Simpson v. State*.<sup>201</sup> Simpson, convicted of murder, produced, in support of his seemingly-untimely post-conviction motion, an affidavit from a fellow inmate identified only as “C. J.”.<sup>202</sup> “C. J. claimed that on the day the victim was shot, C. J. was visiting his step-sister in the area of the shooting when he saw two men fire shots towards the victim’s residence.

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Simpson v. State*, 100 So. 3d 1258 (Fla. 4th DCA 2012).

<sup>202</sup> *Simpson*, 100 So. 3d at 1259.

According to C. J., neither gunman was Simpson, whom C. J. claimed to have known.”<sup>203</sup> The post-conviction court, characterizing this affidavit – filed approximately a decade and a half after the fact – as inherently incredible, denied relief.<sup>204</sup>

And the appellate court reversed. Although it conceded that the demised affidavit was “inherently suspect,”<sup>205</sup> it declined to go so far as to tar the affidavit with the brush of “inherently incredible.” After all, the affidavit “contained no affirmative contradictions as compared to the remainder of the evidence presented at Simpson’s trial, and was not immediately undercut by contradictory testimony in prior legal proceedings.”<sup>206</sup> True, the affidavit was contradicted by some of the trial testimony, but that “is an inappropriate basis to deny post-conviction relief without conducting an evidentiary hearing.”<sup>207</sup>

An item of newly-discovered evidence – an evidentiary artifact that was unknown to the defendant at time of trial and could not have been known to him even by the exercise of due diligence – is the key that opens the door to an evidentiary hearing. But once that door is open, the post-conviction court may, indeed must, hear not only that item of newly-discovered evidence, but any evidence that may properly be offered at retrial and that will assist the post-

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1259.

<sup>205</sup> *Id.* at 1260.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* See also *Williams v. State*, 255 So. 3d 464, 467 (Fla. 3d DCA 2018); *McKinnon v. State*, 221 So.3d 1239 (Fla. 5<sup>th</sup> DCA 2017).

conviction court in determining whether there is a probability of acquittal on retrial. A post-conviction court must go so far as to “consider testimony that was previously excluded as procedurally barred or presented in another post-conviction proceeding.”<sup>208</sup>

## 2. The exception to the two-year rule for retroactive application of law

An otherwise-untimely post-conviction motion may be brought if the right asserted by the movant had not been established during or prior to the two-year period contemplated by Rule 3.850(b), but was subsequently established; has been held to be retroactively applicable; and the motion is brought within two years of the holding establishing retroactivity.<sup>209</sup>

In *Falcon v. State*<sup>210</sup> the Florida Supreme Court considered whether the decision of the United States Supreme Court in *Miller v. Alabama*<sup>211</sup> that a mandatory sentence of life in prison without parole is unconstitutional when imposed upon a juvenile offender should be given retroactive effect, *viz.*, should be applied to those juvenile offenders whose judgments and sentences were already final when *Miller* was decided.<sup>212</sup> Applying Florida’s test for

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<sup>208</sup> *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014). *See also Swafford v. State*, 125 So. 3d 760 (Fla. 2013).

<sup>209</sup> Fla. R. Crim. P. 3.850(b)(2); Fla. Stat. § 924.051(5)(b). The test creates an intentionally narrow exception to a general rule. The law necessarily changes, grows, and evolves constantly. But change, growth, and evolution of the ordinary sort is not intended to be applied retroactively. *See, e.g., Curry v. State*, 257 So. 3d 1076 (Fla. 4<sup>th</sup> DCA 2018).

<sup>210</sup> *Falcon v. State*, 162 So. 3d 954 (Fla. 2015).

<sup>211</sup> *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>212</sup> *Falcon*, 162 So. 3d 954 (Fla. 2015).

retroactivity,<sup>213</sup> the court concluded that *Miller* should be retroactively applied in Florida.<sup>214</sup>

Accordingly, “any juvenile offender seeking to challenge the constitutionality of his or her sentence pursuant to *Miller* through collateral review ... shall have two years from the time the mandate issues in this case to file a motion for postconviction relief.”<sup>215</sup>

### 3. The exception to the two-year rule for neglect by post-conviction counsel

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<sup>213</sup> See *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Pursuant to *Witt*, a change in law applies retroactively only if the new legal doctrine is propounded by the United States Supreme Court or Florida Supreme Court; is constitutional in nature; and constitutes a development of fundamental significance. *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (citing *Witt*, 387 So. 2d at 931).

In *Edwards v. Vannoy*, \_\_\_ U.S. \_\_\_ (2021) the United States Supreme Court completed its reformation of the law of retroactivity. Canvassing those cases in which claims had been made that a new procedural rule was a jurisprudential “watershed” and thus retroactively applicable, the Court concluded that, “no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts.” *Edwards*, \_\_\_ U.S. at \_\_\_. From and after *Edwards*, “New procedural rules do not apply retroactively on federal collateral review.” *Id.* at \_\_\_.

Thus as matters presently stand, when the United States Supreme Court announces a new substantive rule of constitutional law, Florida post-conviction courts are obliged to give that new rule retroactive effect. When the United States Supreme Court announces a new procedural rule of constitutional law, *federal* post-conviction courts reviewing Florida judgments and sentences are prohibited from giving that rule retroactive effect. Whether Florida post-conviction courts are to give such a rule retroactive effect must still be analyzed under the *Witt* line of authorities. That said, it is far from inconceivable that the Florida Supreme Court will at some point choose to abandon *Witt* and adopt the reasoning in *Edwards*, viz., that procedural changes to constitutional law, however profound, are not to be applied retroactively.

<sup>214</sup> *Falcon v. State*, 162 So. 3d 954 (Fla. 2015). See also *Horsley v. State*, 160 So. 3d 393 (Fla. 2015). The *Falcon* court noted that it would reach the same conclusion as to retroactivity if it were to apply the test employed in federal jurisprudence pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *Falcon*, 162 So. 3d at 962.

<sup>215</sup> *Falcon*, 162 So. 3d at 964 (Fla. 2015).

An exception to the two-year limitation is made when “the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.”<sup>216</sup> “Neglect,” in this context, is defined broadly to include any conduct which, in fairness, ought not to be charged to the defendant so as to compromise his entitlement to bring a claim. Thus in *Martinez v. State*,<sup>217</sup> “Martinez’s allegation that his counsel died in the process of preparing the [Rule 3.850] motion, and, therefore, never completed and filed it, if true, satisfies the requirements of Rule 3.850(b)(3) because the failure to timely file was not Martinez’s fault.”<sup>218</sup>

Although the Rule by its terms provides a fixed period of time within which claims based on neglect of counsel may be brought – “A claim based on this exception shall not be filed more than two years after the expiration of the time for filing a motion for post-conviction relief”<sup>219</sup> – the prosecution is not prohibited from defending by means of an assertion of laches whenever appropriate.<sup>220</sup>

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<sup>216</sup> Fla. R. Crim. P. 3.850(b)(3). *See, e.g., Denard v. State*, 152 So. 3d 1257 (Fla. 5th DCA 2014); *Hartsfield v. State*, 139 So. 3d 948 (Fla. 2d DCA 2014); *Nunez-Leal v. State*, 100 So. 3d 66 (Fla. 2d DCA 2011).

<sup>217</sup> 162 So. 3d 1051 (Fla. 5<sup>th</sup> DCA 2015).

<sup>218</sup> *Martinez*, 162 So. 3d at 1053. *See also Babic v. State*, 276 So. 3d 82, 83 (Fla. 2d DCA 2019).

<sup>219</sup> Fla. R. Crim. P. 3.850(b)(3).

<sup>220</sup> *Downs v. State*, 135 So. 3d 521 (Fla. 5th DCA 2014); *Brimage v. State*, 937 So. 2d 230 (Fla. 3d DCA 2006). *See also McCray v. State*, 699 So. 2d 1366 (Fla. 1997) (claim of ineffective assistance of appellate counsel barred by laches); *Smith v. State*, 174 So. 3d 1077, 1078 (Fla. 1<sup>st</sup> DCA 2015) (Thomas, J., dissenting on grounds of laches). The defense of laches is, of course, not restricted to this particular context. It is available to the State as a defense to any post-conviction claim to which it applies.

#### 4. The exception for equitable tolling

Although the Rule is silent on the point, case law has recognized yet another exception to the two-year limitation based upon equitable tolling. Almost all the cases supporting this exception involve Florida defendants who served their sentences in the prison systems of other states, or of the federal government, and thus were without access to Florida legal materials that would assist them in asserting their post-conviction claims.<sup>221</sup> To prevent such defendants from being deprived of their Florida constitutional right of access to the courts,<sup>222</sup> the time restriction imposed by Rule 3.850(b) is tolled.

In *State v. Suarez*,<sup>223</sup> the defendant asserted a different sort of claim of equitable tolling. Ms. Suarez brought a *pro se* claim of ineffective assistance of counsel. That motion was denied as untimely, which denial was affirmed by the court of appeal.<sup>224</sup> “Ms. Suarez asserted, however,

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<sup>221</sup> See, e.g., *Seraphin v. State*, 192 So. 3d 675 (Fla. 2d DCA 2016); *Starling v. State*, 137 So. 3d 568 (Fla. 2d DCA 2014); *Wilson v. State*, 105 So. 3d 667 (Fla. 4th DCA 2013); *Harvey v. State*, 11 So. 3d 457 (Fla. 3d DCA 2009); *Ruiz v. State*, 3 So. 3d 385 (Fla. 2d DCA 2009); *Ramsey v. State*, 965 So. 2d 854 (Fla. 2d DCA 2007); *Demps v. State*, 696 So. 2d 1296 (Fla. 3d DCA 1997).

<sup>222</sup> See *Ruiz*, 3 So. 3d at 386; *Ramsey*, 965 So. 2d at 855; *Demps*, 696 So. 2d at 1298. See Fla. Const’n Art. I § 21 (“The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”). But cf. *Piggott v. State*, 14 So. 3d 298, 299 n. 2 (Fla. 4th DCA 2009): “*Demps* [v. *State*, 696 So. 2d 1296 (Fla. 3d DCA 1997)] was decided 12 years ago. Access to legal materials today does not always require actual physical receipt of paper documents. Under current internet technology legal materials may be available from remote locations, even in some prisons.” See also *Swain v. State*, 330 So. 3d 607 (Fla. 2d DCA 2021); *Hightower v. State*, 324 So. 3d 58 (Fla. 1<sup>st</sup> DCA 2021).

<sup>223</sup> 19 Fla. L. Weekly Supp. 1065a (11<sup>th</sup> Cir. Ct. Sept. 20, 2012) (Hirsch, J.).

<sup>224</sup> *Suarez*, 19 Fla. L. Weekly Supp. at \_\_\_\_.

and continues to assert ... that the untimeliness of her post-conviction application is attributable to nonfeasance on the part of her former appellate counsel, who allegedly neglected to tell her the date by which she was obliged to file” a claim under Rule 3.850.<sup>225</sup> The court of appeal, in its opinion affirming the denial on the basis of untimeliness of Ms. Suarez’s post-conviction motion, left open the possibility that Ms. Suarez could “refile the motion if she has a good faith basis for asserting good cause and excusable neglect.”<sup>226</sup>

The post-conviction court concluded that Ms. Suarez’s appellate counsel, having litigated to completion her direct appeal, had not been retained by her or her family to file a claim of ineffective assistance of trial counsel under Rule 3.850.<sup>227</sup> There was, therefore, no neglect on the part of counsel as that notion is commonly understood in connection with Rule 3.850(b)(3). But there remained the question of law whether appellate counsel was recreant in his duty to Ms. Suarez in failing to advise her, at the time his representation came to an end, as to how much time remained for her to bring a claim under Rule 3.850; and whether his failure to advise her constituted “good cause and excusable neglect” sufficient to permit her to bring an otherwise-untimely post-conviction application.<sup>228</sup> The court found neither a duty on the part of appellate counsel, nor a valid claim of good cause and excusable neglect on the part of Ms. Suarez:

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<sup>225</sup> *Id.* at \_\_\_\_.

<sup>226</sup> *Suarez v. State*, 8 So. 3d 1226 (Fla. 3d DCA 2009).

<sup>227</sup> *Suarez*, 19 Fla. L. Weekly Supp. at \_\_\_\_.

<sup>228</sup> *Id.* at \_\_\_\_.

There is an old maxim that the law has little to say about things left undone. ... Here, Ms. Suarez does not fault her former lawyer for what he did, but for what he did not do. She claims (and in this she is not controverted) that he did not inform her of the time that remained to her to seek relief from her judgment and sentence under Rule 3.850. She further claims ... that this failure to inform on his part vests her, without more, with that “good cause and excusable neglect” which will entitle her to have her post-conviction claim heard on its merits. This is a far broader principle than the precedent will support.

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Our law does not, as a general principle, contemplate that a lawyer whose representation of a client is at an end is obliged to adumbrate for that client all causes of action that might be available to the client in future, and to identify the statutes of limitations applicable to those causes of action. Great as is the duty of a criminal lawyer to his client, the ultimate responsibility of a litigant to assess and act upon his own self-interest is never vested in anyone but that litigant. If that litigant has questions of his lawyer but fails to ask them; if he is unsure of the scope of his lawyer’s representation but fails to clarify it; then he (or in this case, she) will not be heard to plead “good cause and excusable neglect” arising from his own – not his lawyer’s – failure to inquire, failure to clarify, failure to act. Such neglect on the part of the litigant is viewed by the law as entirely inexcusable; for “to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.”<sup>229</sup>

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<sup>229</sup> *Id.* at \_\_\_\_ (quoting Oliver Wendell Holmes, The Common Law 48 (Dover ed. 1991) (1881)). See also *Neloms v. State*, 57 So. 3d 942 (Fla. 3d DCA 2011). And in *Martinez v. State*, 265 So. 3d 690, 692 (Fla. 1<sup>st</sup> DCA 2019), the claimant argued that he was entitled to the benefit of equitable tolling for the period of time during which he suffered from dementia and other intellectual disabilities and was thus incapable of bringing a claim. His litigation history, however, did not support his argument.

The exceptions set forth above to the two-year limitation imposed by Rule 3.850 comprise the complete inventory of such exceptions; there are no others. That, of course, does not prevent ingenious litigants – particularly ingenious *pro se* litigants – from attempting to conjure up others. The world of post-conviction pleading, no less than the world of *haute couture*, has its fashion trends. In recent years, for example, it has been in vogue for claimants seeking to maneuver around the two-year limitation to assert that the error of which they complain is “fundamental” and therefore ought, somehow, to be amenable to adjudication at any time. In *Hughes v. State*<sup>230</sup> Judge Altenbernd “wr[o]te to dispel the common misconception among prisoners that ‘fundamental error’ can be reviewed in a postconviction proceeding at any time, including beyond the two-year period.”<sup>231</sup>

In truth “an allegation of ‘fundamental error’ is unlikely to help [a post-conviction claimant’s] cause and may actually harm it.”<sup>232</sup> If error is fundamental, it can be raised on direct appeal even if not preserved in the trial court. And that being the case, such error almost certainly qualifies as something “that could have or should have been raised ... on direct appeal of the judgment and sentence.”<sup>233</sup> “[C]ourts have occasionally observed that an issue could not

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<sup>230</sup> 22 So. 3d 132 (Fla. 2d DCA 2009).

<sup>231</sup> *Hughes*, 22 So. 3d at 133.

<sup>232</sup> *Id.* at 137.

<sup>233</sup> Fla. R. Crim. P. 3.850(c).

be raised in a postconviction motion because, if it truly were a matter of fundamental error, it could and should have been raised on direct appeal.”<sup>234</sup>

Nor can the pleading requirements and limitations of Rule 3.850 be evaded by the use of common-law writs. There are still many uses in Florida practice for the writ of *habeas corpus*,<sup>235</sup> but as a general rule collateral attack upon the judgment or sentence of a trial court must be made by means, and subject to the requirements and limitations, of Rule 3.850. A post-conviction court is obliged to treat a pleading styled as a motion or petition for writ of *habeas corpus* as

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<sup>234</sup> *Hughes* at 135 (citing *Franqui v. State*, 965 So. 2d 22, 35 (Fla. 2007); *Brudnock v. State*, 16 So. 3d 839 (Fla. 5th DCA 2009)). See *Procedurally Barred Claims*, *supra* at II. C.

<sup>235</sup> A less-than-exhaustive list of uses for the writ of *habeas corpus* in present-day Florida practice includes: Testing the reasonableness of bail or conditions of pretrial release, *Greenwood v. State*, 51 So. 3d 1278, 1279 (Fla. 2d DCA 2011); or of the detention of a juvenile in a delinquency case, *J.J. v. State*, 31 So.3d 297 (Fla. 3d DCA 2010); or of involuntary placement in a mental hospital, *Clarke v. Regier*, 881 So. 2d 656, 658 (Fla. 3d DCA 2004); or of an inmate in “close management,” *Banks v. Jones*, 232 So.3d 963 (Fla. 2017); compelling the production of a “wrongfully withheld” child in child-custody proceedings, *Sargi v. Hernandez*, 939 So. 2d 179 (Fla. 3d DCA 2006); challenging detention as a result of civil commitment proceedings after administrative remedies have been exhausted, *Bronson v. State*, 89 So. 3d 1089 (Fla. 5<sup>th</sup> DCA 2012); and bringing a claim of ineffective assistance of appellate counsel.

*De Quesada v. State*, 289 So. 3d 26 (Fla. 3d DCA 2019), involved a claim pursuant to Rule 3.850 in which the claimant asserted that the charging document under which he was convicted was fundamentally defective. *De Quesada*, 289 So. 3d at 27. Although the claim was grossly untimely – Mr. de Quesada pleaded guilty in 2007, more than a decade before his post-conviction claim was brought – the appellate court took the position that when a charging document “wholly omits an essential element of the crime it is a defect that can be raised at any time.” *Id.* at 28 (quoting *Price v. State*, 995 So. 2d 401, 404 (Fla. 2008)). The *de Quesada* court is correct that such a defect can be raised at any time – but it cannot be raised by means of Rule 3.850 after the two-year limitation provided in the rule. In *Price*, upon which *de Quesada* relies, the defect was properly raised by petition for writ of *habeas corpus*. *Price*, 995 So. 2d at 403 (“Price filed . . . a petition for writ of *habeas corpus*, wherein he alleged that the information charging him with the crime was fatally defective”). See also *Figueroa v. State*, 84 So. 3d 1158 (Fla. 2d DCA 2012).

being brought pursuant to Rule 3.850 if that is what in substance the pleading is. Writs of *coram nobis* and *coram vobis*<sup>236</sup> are no longer part of Florida post-conviction jurisprudence.<sup>237</sup>

5. “Manifest injustice” not generally an exception

“True hope is swift, and flies with swallow’s wings.”<sup>238</sup> As the many *pro se* post-conviction motions alleging claims of “manifest injustice” that presently burden the courts illustrate, false hope may be just as swift and just as conducive to volitation. There appears to be an epidemic of misimpression among Florida inmates that a post-conviction claim, even if meritless, even if previously adjudicated, even if procedurally barred, can be imbued with true hope of success by use of the magic words, “manifest injustice.” The law, however, is very much to the contrary.<sup>239</sup>

That the locution “manifest injustice,” as employed in this context, should be a source of confusion to *pro se* claimants is perhaps not surprising. It is easier to say what “manifest

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<sup>236</sup> See *gen’ly People v. Hyung Joon Kim*, 202 P.3d 436, 445 *et. seq.* (Cal. 2009); *Neighbors v. Commonwealth*, 650 S.E.2d 514, 516-17 (Va. 2007).

<sup>237</sup> *Wood v. State*, 750 So. 2d 592 (Fla. 1999); *Hogan v. State*, 323 So. 3d 771 (Fla. 1<sup>st</sup> DCA 2021); *Kemp v. State*, 245 So. 3d 987 (Fla. 3<sup>d</sup> DCA 2018). *But see infra* n. 255.

<sup>238</sup> Wm. Shakespeare, *Richard III*, Act V sc. 2.

<sup>239</sup> See, e.g., *McClellion v. State*, 186 So. 3d 1129, 1132 (Fla. 4<sup>th</sup> DCA 2016); *Cuffy v. State*, 190 So. 3d 86, 87 (Fla. 4<sup>th</sup> DCA 2015) (“[R]ule 3.850 contains no ‘manifest injustice’ exception to the rule’s time limitations or bar against filing successive post-conviction motions”); *State v. Manning*, 121 So. 3d 1083, 1085 (Fla. 4<sup>th</sup> DCA 2013) (citing *Hall v. State*, 94 So. 3d 655, 657 (Fla. 1<sup>st</sup> DCA 2012) (“[S]imply construing an alleged error as ‘manifest injustice’ does not relieve [a litigant] of the time bar contained in Rule 3.850”) (internal quotations omitted)).

injustice” is not than to say what it is. The law of Florida post-conviction practice is a bramble-bush of procedural bars, time limitations, and other impediments to adjudication on the merits. This is as it should be. A post-conviction claimant has likely had a trial and a direct appeal. The need for additional litigation and adjudication is likely slight. The claimant who calls for that litigation and adjudication is rightly required to comply with strict, even labyrinthine, procedural requirements as a condition of having his claim heard. On rare, very rare, occasions, however, it happens that a judgment or sentence is so patently unfair that obliging a defendant to continue to undergo it strikes judges as inconsistent with the interests of justice.<sup>240</sup> In such rare cases, the “manifest injustice” doctrine acts as a safety valve, permitting courts to grant relief regardless of pleading requirements or procedural bars. So rare and uncommon are these cases, however, that no better attempt to provide a definition of “manifest injustice” can be made than the one offered by Justice Potter Stewart in reference to pornography: the courts can’t define it, but they know it when they see it.<sup>241</sup> As with any plea *ad misericordium*, there exist no fixed or measurable standards by which a litigant’s entitlement to be heard on a claim of “manifest injustice” can be evaluated. It is enough to say that a manifest injustice exists when judges are persuaded that an

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<sup>240</sup> “In extremely rare cases, which presented extraordinary and compelling circumstances, courts have relaxed the procedural bars in order to correct a manifest injustice.” *Erlsten v. State*, 78 So. 3d 60, 61 (Fla. 4<sup>th</sup> DCA 2012). *NB* dictum in *Gusow v. State*, 6 So. 3d 699, 700 (Fla. 4<sup>th</sup> DCA 2009) (Gross, C. J.), in which the movant’s claim was “not that an innocent person was unjustly convicted of a crime, *always a proper subject of post-conviction relief*.” (Emphasis added.)

<sup>241</sup> *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *See also Monroe v. State*, 191 So. 3d 395, 402 (Fla. 2016) (acknowledging that, “one knows a manifest miscarriage of justice only when one sees it”); *Vega v. State*, 288 So. 3d 1252, 1258 (Fla. 5<sup>th</sup> DCA 2020) (“defining what constitutes manifest injustice is more art than science”).

injustice not to be endured has been done; but does not exist when no injustice, or an injustice of the ordinary sort, the sort that any criminal justice system must be expected to absorb, has been done. This necessarily vague standard explains in part the tidal wave of *pro se* claims of “manifest injustice.” Each incarcerated defendant naturally believes that *his* conviction, *his* continued incarceration, is an injustice so great that no justice system worthy of the name would tolerate it.

Brothers Viron and Vishaul Paul were indicted together for murder, but tried separately.<sup>242</sup> Upon appeal from their convictions, Vishaul assigned as error the giving of the manslaughter instruction disapproved in *State v. Montgomery*.<sup>243</sup> The appellate court affirmed his conviction, and he sought further review before the Florida Supreme Court.<sup>244</sup> Although the same jury instruction was given in Viron’s case, he did not raise that issue on direct appeal.<sup>245</sup> His conviction was affirmed without opinion, thus depriving him of the prospect of seeking further review.<sup>246</sup>

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<sup>242</sup> *Paul v. State*, 183 So. 3d 1154, 1155 (Fla. 5<sup>th</sup> DCA 2015).

<sup>243</sup> 39 So. 3d 252 (Fla. 2010).

<sup>244</sup> *Paul*, 183 So. 3d at 1155.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* (citing *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (Florida Supreme Court lacks jurisdiction to review *per curiam* affirmances issued without opinion)).

Based on intervening changes in law, the Florida Supreme Court quashed the affirmance in Vishaul’s case and remanded to the intermediate appellate court. That court then reversed Vishaul’s conviction and remanded for retrial.<sup>247</sup>

In the interim, Viron had filed a series of post-conviction motions including a claim of ineffective assistance of appellate counsel.<sup>248</sup> All such motions, however, had been denied. In light of the outcome in Vishaul’s case, Viron sought relief via a successive motion pursuant to Rule 3.850.<sup>249</sup> That motion, too, was unsuccessful.<sup>250</sup>

On appeal, the Fifth District found Viron’s claim apt for the application of the “manifest injustice” doctrine. Its discussion of that doctrine, in its entirety, consisted of the following:

An appellate court has “the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.” *Coleman v. State*, 128 So.3d 193, 194 (Fla. 5<sup>th</sup> DCA 2013) (alteration in original) (quoting *State v. Atkins*, 69 So.3d 261 (Fla. 2011)). Here, based on the significant similarities in their cases, a manifest injustice will occur if this court, having granted Vishaul a new trial, denies [Viron] the same relief.<sup>251</sup>

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<sup>247</sup> *Paul*, 183 So. 3d at 1156.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Paul*, 183 So. 3d at 1156. The court reached the same result in *Page v. State*, 201 So. 3d 207 (Fla. 5<sup>th</sup> DCA 2016); and *Coleman v. State*, 128 So. 3d 193 (Fla. 5<sup>th</sup> DCA 2013). *See also Crenshaw v. State*, 252 So. 3d 856 (Fla. 2d DCA 2018); *Marshall v. State*, 240 So. 3d 111 (Fla.

The general rule relied upon by the court – the general rule that like-kind litigants should be treated alike – is entirely uncontroversial. But how “significant” must “similarities” between such litigants be before the failure to remedy disparate results constitutes a manifest injustice? The captioned language will not assist the next beleaguered post-conviction judge who is called upon to decide if very different outcomes meted out to not-very-different defendants resulted, not merely in an injustice, but in a *manifest* injustice. The injustice visited upon Viron, if there was one, was less than manifest to Judge Lambert, whose concurring opinion reads very much like a dissent.<sup>252</sup>

None of this is to say that no criteria or categories for “manifest injustice” can be hinted at. When a defendant has somehow managed to be convicted of a non-existent crime, or a crime impossible to commit, or a crime for which he was not charged, courts have used the “manifest injustice” safety valve to permit an application for relief via *habeas corpus*; and this without regard to untimeliness, successiveness, or other procedural bars.<sup>253</sup> When a defendant has

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3d DCA 2018); *Pierre v. State*, 237 So. 3d 402 (Fla. 4<sup>th</sup> DCA 2018); *Wardlow v. State*, 212 So.3d 1091 (Fla. 2d DCA 2017).

<sup>252</sup> See *Paul*, 183 So. 3d at 1157.

<sup>253</sup> See, e.g., *Patlan v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 2d DCA March 30, 2022) (defendant pleaded guilty to a crime he could not have committed); *Davis v. State*, 197 So. 3d 615 (Fla. 5<sup>th</sup> DCA 2016); *Blaxton v. State*, 179 So. 3d 358 (Fla. 2d DCA 2015) (Altenbernd, J.); *Powell v. State*, 174 So. 3d 498, 498 (Fla. 4<sup>th</sup> DCA 2015) (“A conviction for an uncharged crime can be raised at any time as it is a denial of due process”); *Figueroa v. State*, 84 So. 3d 1158 (Fla. 2d DCA 2012); *Erlsten v. State*, 78 So. 3d 60, 61-62 (Fla. 4<sup>th</sup> DCA 2012) (citing *Johnson v. State*, 9 So. 3d 640 (Fla. 4<sup>th</sup> DCA 2009); *Moore v. State*, 924 So. 2d 840 (Fla. 4<sup>th</sup> DCA 2006)); *Carswell v. State*, 23 So. 3d 195 (Fla. 4<sup>th</sup> DCA 2009). NB *Carswell*, 23 So. 3d at 197, n. 3:

somehow managed to be sentenced to an illegal sentence, or a sentence that could not have been imposed in the circumstances of his case, courts have used the “manifest injustice” safety valve to permit an application for relief via *habeas corpus*; and this without regard to untimeliness, successiveness, or other procedural bars.<sup>254</sup> Typically but not necessarily, “manifest injustice” will arise out of an issue of law rather than an issue of fact: claims of newly-discovered facts can and will be brought pursuant to Rule 3.850(b)(1). When courts feel obliged to grant post-

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[P]rocedural bars, such as the law of the case doctrine, must give way ‘where reliance on the prior decision would result in manifest injustice.’ *State v. Sigler*, 967 So. 2d 835, 840 (Fla. 2007) (citing *Henry v. State*, 649 So. 2d 1361, 1364 (Fla. 1994) (citing *Preston v. State*, 444 So. 2d 939, 942 (Fla. 1984)); *Greene v. Massey*, 384 So. 2d 24, 28 (Fla. 1980); *Steele v. Pendarvis Chevrolet, Inc.*, 220 So. 2d 372, 376 (Fla. 1969)); see *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965).

<sup>254</sup> See, e.g., *Plasencia v. State*, 170 So. 3d 865 (Fla. 2d DCA 2015); *Turner v. State*, 110 So. 3d 531 (Fla. 1<sup>st</sup> DCA 2013) (citing *State v. Atkins*, 69 So. 3d 261, 268 (Fla. 2011)); *Prince v. State*, 98 So. 3d 768 (Fla. 4<sup>th</sup> DCA 2012) (quoting *Anglin v. Mayo*, 88 So. 2d 918, 919 (Fla. 1956) (“If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice”)); *Johnson v. State*, 9 So. 3d 640 (Fla. 4<sup>th</sup> DCA 2009).

Rule 3.850(b) provides that, “A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time.” Thus untimeliness without more is not a bar to such a claim. Once a claim of illegal sentence has been made and adjudicated, however, other procedural bars – the “law of the case” doctrine, say, or successiveness – may prevent its adjudication, absent a showing of “manifest injustice.” See, e.g., *Haager v. State*, 36 So. 3d 883, 884 (Fla. 2d DCA 2010); *Bronk v. State*, 25 So. 3d 701, 702-03 (Fla. 2d DCA 2010); *Brinson v. State*, 995 So. 2d 1047, 1049 (Fla. 2d DCA 2008); *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2d DCA 2008); *Cillo v. State*, 913 So. 3d 1233, 1233 (Fla. 2d DCA 2005).

conviction relief to rectify a manifest injustice, they do so by treating the claimant's pleading as a petition for writ of *habeas corpus* and granting the writ.<sup>255</sup>

Based on conduct in which he engaged in the Hillsborough County Jail on February 11, 2004, Otis Blaxton was convicted of escape and sentenced to thirty years in prison. But by that date, the incarcerative portion of Mr. Blaxton's sentence should have ended; he shouldn't have been in jail at all.<sup>256</sup> It appears that Blaxton's trial attorney was unaware that Blaxton was unlawfully confined and thus had a complete defense to the escape charge.<sup>257</sup> Although over the course of the ensuing years Mr. Blaxton filed "many [post-conviction] motions and appeals,"<sup>258</sup> apparently none of them succeeded in conveying the message that he had been convicted and sentenced for a crime that as a matter of law he could not have committed.

In 2015, the court of appeal unraveled the thread of Blaxton's tangled legal history, in the process recognizing that he "has been attempting to allege an issue that possibly could rise to the level of a manifest injustice."<sup>259</sup> Given that more than a decade had passed since the time of the offense, any remedy would have to be by writ of *habeas corpus*. "[I]f Mr. Blaxton elects to file a

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<sup>255</sup> As a matter of legal theory, this would pose a problem if the claimant were out of custody having, for example, completed his sentence. Query whether it would be necessary to revive the writ of error *coram nobis* in such a case.

<sup>256</sup> *Blaxton v. State*, 179 So. 3d 358, 360 (Fla. 2d DCA 2015).

<sup>257</sup> *Blaxton*, 179 So. 3d at 358.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

petition for writ of *habeas corpus* as to this specific issue, the circuit court should accept the petition and give it due consideration.”<sup>260</sup>

Achieving a clear and proper understanding of what is meant by “manifest injustice” – a difficult task at best – is made even more difficult by the misuse by *pro se* claimants of the locution “actual innocence.” Undoubtedly it is true that “the contention ... that an innocent person was unjustly convicted of a crime [is] always a proper subject of postconviction relief.”<sup>261</sup> Evidence of such actual innocence, if it qualifies as newly discovered, may be brought to the court’s attention outside the two-year time limit that would otherwise apply. When the evidence of actual innocence is of the sort detailed in *Blaxton* – not, strictly speaking, newly discovered for purposes of that exception to the two-year limitation – it may, in rare circumstances, support a claim of manifest injustice. But it does not follow, and it is emphatically not the case, that there exists a free-standing post-conviction cause of action called “actual innocence,”<sup>262</sup> pursuant to which a claimant can, by a naked assertion of his innocence, demand a plenary review of all facts and proceedings culminating in his conviction and continued incarceration.<sup>263</sup> The cognizable

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<sup>260</sup> *Id.* at 358-59.

<sup>261</sup> *Gusow v. State*, 6 So. 3d 699, 700 (Fla. 4<sup>th</sup> DCA 2009) (Gross, C. J.)

<sup>262</sup> *Dailey v. State*, 279 So. 3d 1208, 1218 (Fla. 2019) (“freestanding claims of actual innocence are not cognizable under Florida law”).

<sup>263</sup> “Florida does not recognize an independent claim of actual innocence in post-conviction proceedings.” *Sweet v. State*, 293 So. 3d 448, 453-54 (Fla. 2020) (citing *Elledge v. State*, 911 So. 2d 57, 78 (Fla. 2005)). *Elledge* can be read as proceeding on a theory of procedural bar: because the ultimate question of guilt or innocence is at issue, impliedly or expressly, in every direct appeal, a defendant’s actual innocence has been adjudicated on direct

grounds for post-conviction relief are those set forth in Rule 3.850(a)(1) through (6); and “actual innocence” is not among them.

The mistaken notion that an assertion of actual innocence is, in and of itself, a free-standing claim for post-conviction relief has its genesis in federal, not Florida, post-conviction practice. Once upon a time, federal habeas review served as a safety net for state-court criminal defendants whose convictions were the product of political pressures that elected state-court judges were unable to resist.<sup>264</sup> Beginning in the mid-‘70’s, however, a series of Supreme Court

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appeal and thus cannot be raised on collateral attack. Of course this analysis – if in fact it is what the *Elledge* court intended – would be inapplicable in a case in which a defendant took no direct appeal but did raise a post-conviction claim. *See also Tompkins v. State*, 994 So. 2d 1072, esp. at 1089 (Fla. 2008) (citing *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006)).

<sup>264</sup> In 1913 Leo M. Frank, an Atlanta factory manager, was accused of the murder of Mary Phagan, a thirteen-year-old girl in his employ. The evidence against Frank was all but non-existent; but Frank was Jewish, and the Atlanta newspapers created an atmosphere of mob hysteria that carried judge and jury along and resulted in conviction.

Frank’s lawyers pursued every appellate remedy. On April 12, 1915, however, the United States Supreme Court held – over a dissent authored by Oliver Wendell Holmes and joined by Charles Evans Hughes – that there was no basis for federal *habeas* relief. *Frank v. Mangum*, 237 U.S. 309 (1915). It would be eight years before the Court, with Holmes this time writing for the majority, held that “mob justice” was a deprivation of that due process which the Constitution guarantees and which the federal courts are bound to protect. *Moore v. Dempsey*, 261 U.S. 86 (1923).

The *Moore* opinion came too late to help Leo Frank. On August 16, 1915, shortly after nightfall, twenty-five of Atlanta’s and Marietta’s leading citizens kidnapped Frank from the state prison in Milledgeville, drove him through the night to a farm adjoining Mary Phagan’s birthplace, and hanged him from a tall oak tree. Three thousand people came to see the body before it was cut down. The hanging rope was cut into pieces and sold for souvenirs. One of the leaders of the lynch mob, a local judge, arranged for Frank’s corpse to be removed to prevent its desecration.

opinions narrowed access to federal post-conviction courts on the part of state-court petitioners; and in the mid-‘90’s, AEDPA (the "Antiterrorism and Effective Death Penalty Act") became law, the effect of which was to make it easier for an entire herd of camels to pass through the eye of a small needle than for a state-court petitioner to obtain federal habeas review. As a saving grace, *Herrera v. Collins*<sup>265</sup> included *dictum* suggesting that in a capital case, a colorable claim of actual innocence might be sufficient to cut through the Gordian knot of AEDPA and entitle a petitioner to review on the merits.<sup>266</sup> A too-expansive and too-hopeful reading of *Herrera* by post-conviction claimants has engendered the false notion that there exists, as a general matter, a free-standing claim, assertable in post-conviction practice, of actual innocence. But none of this has anything at all to do with Florida – as opposed to federal – post-conviction practice.

In her Statement Respecting the Denial of *Certiorari* in *Reed v. Texas*,<sup>267</sup> Justice Sotomayor noted that:

Texas . . . has recognized that the incarceration or execution of the actually innocent violates the Due Process Clause of the Fourteenth Amendment. . . . An innocence claim in Texas thus may serve as a freestanding, substantive basis for habeas relief . . . not merely a procedural gateway to reach an underlying claim for habeas relief.<sup>268</sup>

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<sup>265</sup> 506 U.S. 390 (1993).

<sup>266</sup> *Herrera*, 506 U.S. at, e.g., 404. See, e.g., *Reeves v. Fayette SCI*, 897 F. 3d 154 (3<sup>rd</sup> Cir. 2018).

<sup>267</sup> 589 U.S. \_\_\_\_ (February 24, 2020).

<sup>268</sup> *Reed*, 589 U.S. at \_\_\_\_.

In this important respect the law of Florida differs from that of Texas. If Florida courts were to “recognize[] that the incarceration or execution of the actually innocent violates the Due Process Clause of the Fourteenth Amendment,” then such incarceration or execution would constitute a “judgment . . . or sentence . . . imposed in violation of the Constitution . . . of the United States” under Rule 3.850(a)(1) and would be amenable to collateral attack under the rule.

Because Florida law does not expressly recognize the incarceration or execution of an actually innocent person as a Due Process violation, actual innocence is not a freestanding substantive basis for relief under Rule 3.850. Rather, the manifest injustice doctrine serves as a claim of last resort, vesting Florida judges with a power to vacate judgments or sentences in those rare instances in which courts can have no confidence that the right man is behind bars, or no confidence in the process by which he was placed, or is being kept, behind bars. The infirmities of the “manifest injustice” model – the undeniable fact that “manifest injustice” is as mutable and inaccurate a measuring tool as is the chancellor’s foot – are not remedied by the “actual innocence” model. A given judge’s determination of how actual a claim of innocence is may be just as mutable and inaccurate. Still, there is a difference. To grant relief in a jurisdiction that recognizes actual innocence as a freestanding post-conviction claim, the post-conviction judge must be prepared to say no more and no less than that the claimant is innocent of the crime of conviction. To grant relief in a jurisdiction that proceeds under the doctrine of manifest injustice, the post-conviction judge must be prepared to say that, however complete or incomplete the proof of the claimant’s guilt of the crime of conviction, the continued existence of the judgment or sentence (or both) that he undergoes is an intolerable injustice.

### III. Reviewing the record as to a facially sufficient motion

For a few exhilarating days toward the end of the 19<sup>th</sup> century, all of London followed with fascination the murder trial of Marie Hermann. The facts against her were very bad, but her lawyers were very good: Arthur Newton was her solicitor, and the great Edward Marshall Hall her barrister. As Marshall Hall concluded his closing argument and appeared about to sit down, he, in the words of his biographer, “caught sight of the wretched little prisoner, hideous, huddled, weeping, in the dock, the very flotsam of humanity. Pointing to her, he said, his voice full of the pity of this last appeal, ‘Look at her, gentlemen of the jury. Look at her. God never gave her a chance – won’t you?’”

The jury returned a verdict of conviction on the lesser included offense of manslaughter. Her life spared, Ms. Hermann expressed her heartfelt gratitude to her legal team.

At least she did then. When she got out of prison she hired another lawyer to write to Arthur Newton demanding an accounting of the money spent on her defense (to which she had contributed nothing). Newton’s reply was as follows: “Dear Sir, We saved your client from the gallows. Yours sincerely, Arthur Newton.”

If a motion brought pursuant to Rule 3.850 is both untimely and otherwise insufficient, the post-conviction court is to enter a final order denying the motion with prejudice.<sup>269</sup> If such a motion is timely but facially insufficient, the post-conviction court is to enter an order denying it

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<sup>269</sup> Fla. R. Crim. P. 3.850(f)(1).

without prejudice and affording the movant 60 days to remedy the insufficiency.<sup>270</sup> If the motion is facially sufficient,

the court may then review the record. If the record *conclusively* refutes the alleged claim, the claim may be denied. In doing so, the court is required to attach those portions of the record that conclusively refute the claim in its order of denial.<sup>271</sup>

The record, for this purpose, means just that; the court cannot consider any not-of-record documents or materials in making its determination at this stage of the analysis.<sup>272</sup>

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<sup>270</sup> Fla. R. Crim. P. 3.850(f)(2); *Spera v. State*, 971 So. 2d 754 (Fla. 2007). *But see supra* at II A 2.

<sup>271</sup> *Jacobs v. State*, 880 So. 2d 548, 550 (Fla. 2004) (emphasis in original). *See also* Fla. R. Crim. P. 3.850(f)(5); *Pham v. State*, 177 So. 3d 955, 959 (Fla. 2015) (“The summary denial of a postconviction claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record”); *Parker v. State*, 611 So. 2d 1224 (Fla. 1992) (quoting *Lightbourne v. State*, 471 So. 2d 27 (Fla. 1985)). *See, e.g., Scott v. State*, 335 So. 3d 1273 (Fla. 2d DCA 2022) (two witnesses identified defendant at trial as perpetrator; their affidavits in support of his post-conviction motion averring that they had not seen defendant at the scene of the crime and had been coerced by detective was sufficient to warrant an evidentiary hearing); *Flint v. State*, 184 So. 3d 610 (Fla. 2d DCA 2016) (record does not conclusively refute claim that trial counsel advised defendant to reject plea offer and that such advice was unreasonable at time given); *Smith v. State*, 185 So. 3d 585 (Fla. 2d DCA 2016) (record does not conclusively refute claim that defendant suffered prejudice because trial counsel was ineffective for not impeaching eyewitness).

<sup>272</sup> *Palmer v. State*, 240 So. 3d 824 (Fla. 5<sup>th</sup> DCA 2018); *Mendez-Domingo v. State*, 238 So. 3d 382 (Fla. 2d DCA 2017); *Forte v. State*, 189 So. 3d 1043 (Fla. 2d DCA 2016); *Ciambrone v. State*, 128 So. 3d 227 (Fla. 2d DCA 2013) (citing *Havis v. State*, 555 So. 2d 417, 418 (Fla. 1st DCA 1989)); *Duncan v. State*, 776 So. 2d 287, 290 n. 2 (Fla. 2d DCA 2000); *Johnson v. State*, 736 So. 2d 713 (Fla. 2d DCA 1999); *Cintrón v. State*, 504 So. 2d 795 (Fla. 2d DCA 1987).

Fla. R. Crim. P. 3.850(f)(6) provides that, “Unless the motion, files, and record in the case conclusively show that the defendant is entitled to no relief, the court shall order the state attorney to file ... an answer to the motion.”<sup>273</sup> By contrast, *Jacobs v. State* provides that in these circumstances, “the court *may* order the state attorney’s office to file a response.”<sup>274</sup> Surely the post-conviction court retains some measure of discretion to determine if any good purpose would be served by ordering the prosecution to file a written response to the motion. Compare, for example, *Harris v. State*.<sup>275</sup> At issue in *Harris* was a motion brought, not pursuant to Rule 3.850, but pursuant to Rule 3.853. “The post-conviction court examined the record and denied Harris’s motion on its merits. But if a post-conviction court finds that a Rule 3.853 motion is facially sufficient, it must order a response from the State. ... A response is required even when an examination of the record conclusively shows that the defendant is not entitled to relief.”<sup>276</sup> Rule 3.853(c)(2) provides, in terms that seem to leave the post-conviction court with no discretion whatever, “If the motion is facially sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.” Subsections (f)(5) and (f)(6) of Rule 3.850, however, are less peremptory in their terms.

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<sup>273</sup> Fla. R. Crim. P. 3.850(f)(6). *See also State v. Lundy*, 211 So. 3d 135 (Fla. 4<sup>th</sup> DCA 2017).

<sup>274</sup> *Jacobs*, 880 So. 2d at 551 (emphasis added).

<sup>275</sup> 183 So. 3d 1065 (Fla. 2d DCA 2015).

<sup>276</sup> *Harris*, 183 So. 3d at 1065.

Both permit the post-conviction court to determine if a motion is susceptible of adjudication on the record; and, if it is, to adjudicate the motion without more.

It is the practice of some post-conviction judges to order a State's response and then to incorporate the response as the court's order. This practice is very much disfavored,<sup>277</sup> but is not grounds for reversal on appeal without more.<sup>278</sup>

#### IV. Evidentiary hearings

“[I]f the trial court finds that the motion is facially sufficient, that the claim is not conclusively refuted by the record, and that the claim is not otherwise procedurally barred, the trial court should hold an evidentiary hearing to resolve the claim.”<sup>279</sup> A “motion for post-conviction relief can be denied without an evidentiary hearing when the motion and the record

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<sup>277</sup> *Rollins v. State*, 246 So. 3d 1284, 1286-87 (Fla. 2d DCA 2018) (citing *Barnes v. State*, 38 So. 3d 218, 219-20 (Fla. 2d DCA 2010)).

<sup>278</sup> *Rollins*, 246 So. 3d at 1287. The *Rollins* court also quite correctly points out that if the post-conviction court does order a State's response, the movant has no claim of right to reply to that response. *Id.* at 1287 (citing Fla. R. Crim. P. 3.850(f)(6); *Evans v. State*, 764 So. 2d 822, 823 (Fla. 2000)).

<sup>279</sup> *Jacobs v. State*, 880 So. 2d 548, 551 (Fla. 2004). See also *Weintraub v. State*, 328 So. 3d 1142 (Fla. 4<sup>th</sup> DCA 2021) (record does not refute defendant's initial claim); *Woodbury v. State*, 302 So. 3d 492 (Fla. 2<sup>nd</sup> DCA 2020); *Rubino v. State*, 310 So. 3d 1022 (Fla. 2<sup>nd</sup> DCA 2020); *Maxwell v. State*, 190 So. 3d 230, 232 (Fla. 3d DCA 2016) (defendant is entitled to an evidentiary hearing unless the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, or the motion or particular claims are insufficient) (quoting *Lee v. State*, 789 So. 2d 1176, 1177 (Fla. 3d DCA 2001)).

conclusively demonstrate that the movant is entitled to no relief.”<sup>280</sup> “To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion.”<sup>281</sup> “When a motion for post-conviction relief under [Rule 3.850] is granted or denied without an evidentiary hearing ... unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.”<sup>282</sup>

It is apodictic that no post-conviction judge will ever be reversed for granting a hearing, and that some post-conviction judges will be reversed for denying a hearing.<sup>283</sup> That said, there are some, perhaps quite a few, post-conviction claims which, although facially sufficient and not

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<sup>280</sup> *Foster v. State*, 810 So. 2d 910, 914 (Fla. 2002) (citing *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)); *Robinson v. State*, 328 So. 3d 998 (Fla. 4<sup>th</sup> DCA 2021); *Maxwell v. State*, 169 So. 3d 1264, 1265 (Fla. 5<sup>th</sup> DCA 2015).

<sup>281</sup> *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002) (citing *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993)).

<sup>282</sup> Fla. R. App. P. 9.141(b)(2)(A) & (D).

<sup>283</sup> In *Arroyave v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 2d DCA Nov. 9, 2022), the movant alleged that his trial counsel failed to inform him that he was facing a 25-year mandatory minimum; and that if he had been so informed, he would not have rejected the prosecution’s 15-year plea offer. *Arroyave*, \_\_\_ So. 3d at \_\_\_. The post-conviction court denied the motion summarily, justifying its decision not to conduct a hearing on the two grounds, “that Mr. Arroyave should have known he faced a minimum mandatory term[,] and that he did not react to imposition of the 25-year minimum mandatory term at sentencing.” *Id.* at \_\_\_. The matter was remanded for a hearing. It was deficient performance if trial counsel failed properly to advise Arroyave of possible sentencing outcomes. Whether such advice as was given was improper, and whether Arroyave was prejudiced by it, are questions that require a hearing to resolve. Nor is Mr. Arroyave’s “lack of reaction,” *id.* at \_\_\_, a sufficient basis for resolving these questions of fact.

refuted by the record, do not merit evidentiary hearings. As the Fourth District has very helpfully observed:

A postconviction movant cannot disown knowledge of the obvious. A postconviction court is not required to hold hearings on absurd claims or accept as true allegations that defy logic and which are inherently incredible.

...

[Appellate] [c]ourts should not apply the principle that, in postconviction relief proceedings, “where no evidentiary hearing is held below, [the appellate court] must accept the defendant’s factual allegations to the extent they are not refuted by the record.” *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999) (citation omitted).

Courts do not have to accept bald allegations that the prejudice component of an ineffective assistance of counsel claim is met. Where, under the totality of the circumstances, no objectively reasonable probability of prejudice exists, the claim may be summarily denied. Courts are not required to hold evidentiary hearings on objectively unreasonable postconviction claims.<sup>284</sup>

When a post-conviction claimant alleges ineffective assistance of his trial counsel and cites, as the instance of ineffectiveness, a tactical decision that counsel made (*e.g.*, calling a

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<sup>284</sup> *Capalbo v. State*, 73 So. 3d 838, 840-41 (Fla. 4th DCA 2011). *See also Stilley v. State*, 222 So. 3d 601, 602 (Fla. 4th DCA 2017) (post-conviction court not obliged to hold a hearing because Stilley’s “claims that he would not have taken such a favorable plea offer and would have gone to trial, given the evidence against him, are patently incredible. [He] was facing mandatory life and thirty years in prison on four counts as a career criminal and a prison releasee reoffender. He entered a negotiated plea to a term of probation.”) (citing *Capalbo*); *Mallet v. State*, 270 So. 3d 1282 (Fla. 1st DCA 2019). *But cf. Lewis v. State*, 319 So. 3d 56 (Fla. 4th DCA 2021); *Mitchell v. State*, 260 So. 3d 456 (Fla. 5th DCA 2018); *Utile v. State*, 235 So. 3d 1045 (Fla. 5th DCA 2018). *See gen’ly Barros v. State*, 254 So. 3d 1186 (Fla. 5th DCA 2018); *Grays v. State*, 246 So. 3d 520 (Fla. 5th DCA 2018); *Cosme v. State*, 232 So. 3d 8 (Fla. 4th DCA 2017).

witness who, in retrospect, would have been better not called; or not calling a witness who, in retrospect, perhaps should have been called), it is usually necessary to convene a hearing.<sup>285</sup> That said, the language excerpted from *Capalbo, supra*, is applicable to this determination.

Subsection (g) of Rule 3.850 provides that a defendant's presence "shall not be required at any hearing or conference held under this rule except at the evidentiary hearing on the merits of any claim." This is constitutionally unobjectionable. Proceedings pursuant to Rule 3.850 are civil proceedings, conducted by the criminal court pursuant to its ancillary jurisdiction. There is no constitutional entitlement to be present for civil proceedings. Arguably even the rule's requirement that a post-conviction movant be present for the evidentiary hearing on his motion is a mere act of grace. Regarding whether a litigant can be "present" via Zoom or like-kind audio-visual technology, *cf. Clarington v. State*.<sup>286</sup>

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<sup>285</sup> See, e.g., *Pinder v. State*, 804 So. 2d 350, 350-51 (Fla. 4th DCA 2001) (citing *Anthony v. State*, 660 So. 2d 374 (Fla. 4th DCA 1995)). See also *Gutierrez v. State*, 342 So. 3d 295 (Fla. 5<sup>th</sup> DCA 2022) (as to claim of ineffectiveness in connection with failure to impeach witness, court should have conducted a hearing). See *gen'ly Reeves v. Alabama*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 22 (Nov. 13, 2017) (Sotomayor, J., dissenting from denial of *cert.*). It sometimes happens that an attorney, in a selfless effort to benefit his client, will concede the ineffectiveness of his own performance. Such an act of altruism does not relieve the post-conviction court of its duty to conduct a hearing. Trial counsel's deficient performance is not established, or even evidenced, by his willingness to express an opinion that he was deficient. See *Douse v. State*, 232 So. 3d 1024 (Fla. 4<sup>th</sup> DCA 2017) (collecting cases); *State v. Bishop*, 300 So. 3d 1198, 1199 (Fla. 4<sup>th</sup> DCA 2020) ("trial counsel testified he failed to move to exclude or suppress Defendant's request for counsel [during custodial interrogation], and alleged it was not a strategic decision"). Whether trial counsel actually rendered ineffective assistance "does not depend on . . . an attorney's admission of deficient performance." *O'Neal v. Burt*, 582 Fed. Appx. 566, 572 (6<sup>th</sup> Cir. 2014) (quoting *Jennings v. McDonough*, 490 F. 3d 1230, 1247 (11<sup>th</sup> Cir. 2007)).

<sup>286</sup> 314 So. 3d 495 (Fla. 3d DCA 2020).

Curiously, no case squarely holds that the rules of evidence apply at hearings on post-conviction motions. Their applicability must be inferred. Thus for example, Fla. R. Crim. P. 3.010 expressly provides that the Rules of Criminal Procedure apply to “proceedings under Rule 3.850.” By implication, shouldn’t the rules of evidence apply as well?<sup>287</sup> Fla. R. Crim. P. 3.812(d) provides that at hearings conducted under that rule, the evidence code does not apply. By implication, does it not follow that as to hearings conducted under other rules of criminal procedure, the evidence code does apply? *Randolph v. State*<sup>288</sup> seems to take it as a given that the rules of evidence apply to proceedings under 3.850;<sup>289</sup> but also speaks of the trial (or post-conviction) court’s broad discretion to receive or reject evidence, which discretion, unless abused, will not be disturbed on appeal.<sup>290</sup> We have no less an authority than Prof. Thayer for the proposition that, “It is th[e] institution of the jury which accounts for the common-law system of evidence.”<sup>291</sup> There is, of course, no jury at a hearing on a post-conviction motion. The court sits as trier of both fact and law.

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<sup>287</sup> See also *Duckett v. State*, 918 So. 2d 224, 239 (Fla. 2005) (citing *Thompson v. Calderon*, 151 F.3d 918, 935 n.2 (9<sup>th</sup> Cir. 1998) for the proposition that the prosecution’s *Brady* obligation codified at Fla. R. Crim. P. 3.220(b)(4) applies in post-conviction litigation).

<sup>288</sup> 853 So. 2d 1051 (Fla. 2003).

<sup>289</sup> *Randolph*, 853 So. 2d at 1062.

<sup>290</sup> *Id.*

<sup>291</sup> James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 2 (Little, Brown & Co. 1898).

The post-conviction claimant in *Grange v. State*<sup>292</sup> alleged that his trial counsel was ineffective for failing to call alibi and other defense witnesses.<sup>293</sup> Trial counsel did not testify at the hearing had on the motion; but his deposition was taken shortly before the hearing, and the post-conviction court read and considered the transcript of that deposition.<sup>294</sup> When the post-conviction court then denied the motion, Grange sought appellate review on the grounds both that the deposition transcript was hearsay, and that reliance upon it violated his right to confrontation under the Sixth Amendment.<sup>295</sup>

Rejecting the hearsay argument, the court of appeal had this to say:

We deny the motion insofar as the appellant challenges the propriety of the trial court's consideration of the deposition testimony of trial counsel in lieu of live testimony at the evidentiary hearing. Nothing in Rule 3.850 or interpretive case law precludes the trial court from considering transcripts which were part of the court record along with live testimony presented at the evidentiary hearing on a claim.<sup>296</sup>

It would be inappropriate to read the foregoing language as establishing a broad and general principle that the rules of evidence have no applicability to a post-conviction hearing. Clearly the court did not intend to go that far. *Grange* approved the lower court's receipt of a

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<sup>292</sup> 199 So. 3d 440 (Fla. 4<sup>th</sup> DCA 2016).

<sup>293</sup> *Grange*, 199 So. 3d at 441.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 442.

hearsay document “along with live testimony presented at the evidentiary hearing.”<sup>297</sup> The rules of evidence do apply at post-conviction hearings, but the post-conviction judge, sitting in the absence of a jury, has ample discretion to receive or discount evidence based upon his sense of its probative value and reliability. *Grange* is not at odds with that notion. On the contrary; it provides an example of it.<sup>298</sup>

The Confrontation Clause objection was readily dealt with. The Sixth Amendment is, by its terms, applicable to “criminal prosecutions.” Post-conviction proceedings are universally recognized to be civil proceedings conducted by a criminal court pursuant to its ancillary jurisdiction.<sup>299</sup> A post-conviction petitioner is not, for Sixth Amendment purposes, a criminal defendant, and is not entitled to the Sixth Amendment right of confrontation.

When an evidentiary hearing is conducted, trial counsel will almost always be a witness. The question may then arise whether post-conviction counsel may ask a question such as: Has a claim of ineffective assistance of counsel ever been made against you in any other case? As with any question on cross-examination, the examiner must have a good-faith basis for the question.

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<sup>297</sup> *Id.* at 441.

<sup>298</sup> See *Griffin v. State*, 344 So. 3d 623, 625 (Fla. 2d DCA 2022) (“unsworn statements made by [trial] counsel [at a hearing on a post-conviction motion] cannot be considered as evidence”).

<sup>299</sup> *Grange* at 442 (citing *Jones v. State*, 69 So. 3d 329 (Fla. 4<sup>th</sup> DCA 2011)). In criminal cases, deposition transcripts can be used solely, “for the purpose of contradicting or impeaching the testimony of the deponent as a witness.” Fla. R. Crim. P. 3.220(h)(1). In civil proceedings, however, deposition transcripts are received as substantive evidence. See *gen’ly* Fla. R. Civ. Pro. 1.310.

Such a good-faith basis should probably require the examiner reasonably to believe that a prior claim was made against trial counsel, and that it alleged the same sort of error as was purportedly committed in the case being heard. Post-conviction claims of ineffectiveness are a commonplace nowadays. *Pro se* litigants can be counted on to make them. Assistant public defenders can be counted on to have received several. That such a claim was made against trial counsel in a prior case is probative of little or nothing. That the particulars of such a claim in a prior case are akin to the particulars of the claim in the present case may be probative of something. If ineffectiveness was found in the prior case, the probative value may be considerable.

Neither a post-conviction claimant nor the State has a general right to pre-hearing discovery.<sup>300</sup> That said, “it is within the [post-conviction] judge’s inherent authority, rather than any express authority found in the Rules of Criminal Procedure, to allow limited discovery.”<sup>301</sup> In exercising this inherent authority, the post-conviction judge is to consider “the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence,” among other factors; and to grant discovery only upon a showing of good cause.<sup>302</sup> The post-conviction court in *State v. Glenn*<sup>303</sup> granted an order to compel the prosecution “to produce certain limited

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<sup>300</sup> *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994).

<sup>301</sup> *Lewis*, 656 So. 2d at 1249.

<sup>302</sup> *Id.* at 1250. *See also Trepal v. State*, 754 So. 2d 702 (Fla. 2000). *Cf.* Fla. R. Crim. P. 3.851(f)(5)(A).

<sup>303</sup> 294 So. 3d 1017 (Fla. 5<sup>th</sup> DCA 2020).

discovery prior to an evidentiary hearing” on Glenn’s 3.850 motion.<sup>304</sup> The prosecution sought to appeal. The appellate court “treat[ed] the State’s appeal as a petition for writ of *certiorari*, and . . . dismiss[ed] the petition because the State has failed to show that it will sustain irreparable harm in complying with the [discovery] order.”<sup>305</sup>

I am grateful to Judge Thomas J. Rebull for providing me with his very thoughtful order in *State v. Espinosa*.<sup>306</sup> In *Espinosa* the prosecution sought leave to take the deposition of the post-conviction claimant prior to the hearing on his motion. Judge Rebull began by recognizing, correctly, that he had inherent power to order discovery, properly tailored to the needs of the parties and the circumstances of the hearing.<sup>307</sup> Here, the prosecution’s request to take the deposition of Mr. Espinosa was based on a claimed concern that his testimony at the hearing would surprise the State, leaving the prosecutors unprepared and disadvantaged. But Mr. Espinosa had identified in detail in the affidavits supporting his Rule 3.850 motion the testimony that he proposed to give. Indeed it was on the basis of those affidavits that he was determined to be entitled to a hearing. There was no reason to apprehend surprise. Judge Rebull left open the possibility that:

If after Mr. Espinosa’s testimony the State establishes that it was surprised by his testimony and it could not have, through due

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<sup>304</sup> *Glenn*, 294 So. 3d at 1017.

<sup>305</sup> *Id.*

<sup>306</sup> 2021 WL 4932696 (Fla.Cir.Ct. Oct. 21, 2021).

<sup>307</sup> *Id.* at \_\_\_\_ (citing *State v. Lewis*, 656 So. 2d 1248, 1249 (Fla. 1994)).

diligence, been prepared to present witnesses or other evidence to rebut such “surprise testimony,” I will consider adjourning the hearing to all the State to obtain such evidence. The State will have to make such a request at that time and will have the burden to establish “surprise” and provide some indication as to the specific additional evidence it wishes to present. Mr. Espinosa will of course be heard in opposition to any such request.<sup>308</sup>

No Florida appellate court has squarely resolved the intriguing question whether a legal expert’s testimony is admissible in support of a post-conviction claim alleging ineffective assistance of counsel. There appears to be a body of decisional law from other American jurisdictions – some opinions reported, some not – in which such evidence has been received.<sup>309</sup> To the extent the issue of ineffectiveness is one of law, expert testimony should not be admissible. As a general rule, “Expert testimony is not admissible concerning a question of [Florida] law,”<sup>310</sup> on the theory that it is the responsibility of the court to know the law.<sup>311</sup> To the extent the issue of ineffectiveness is one of fact, or is a mixed question of law and fact, however, the post-conviction court likely has discretion to receive expert testimony if the court believes that its adjudicative process will be aided by such testimony.<sup>312</sup>

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<sup>308</sup> *Id.* at \_\_\_\_.

<sup>309</sup> See, e.g., *Hamilton v. Ayers*, 583 F.3d 1100, 1130 (9th Cir. 2009); *Cooper v. Ricci*, CIV No. 10-2901, 2013 WL 1385637, at \*12-13 (D. N.J. April 3, 2013); *Hunt v. Smith*, 856 F. Supp. 251, 259 (D. Md. 1994).

<sup>310</sup> *Lee County v. Barnett Banks, Inc.*, 711 So. 2d 34, 34 (Fla. 2d DCA 1997).

<sup>311</sup> *Id.* at 34 (citing *Edward J. Siebert v. Bayport Beach and Tennis Club*, 573 So. 2d 889 (Fla. 2d DCA 1990), *rev. denied*, 583 So. 2d 1034 (Fla. 1991)). See also *Devin v. City of Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976).

<sup>312</sup> See, e.g., *Jones v. State*, 330 So. 3d 130 (Fla. 2d DCA 2021); *Carpenter v. Warden, State Prison*, No. TSRCV134005058S, 2015 WL 4173947, at \*8-9 (Conn. Super. Ct. June 18,

Remarkably, subsection (f)(7) of Rule 3.850 continues to provide that:

The court may appoint counsel to represent the defendant under this rule. The factors to be considered by the court in making this determination include: the adversary nature of the

proceeding, the complexity of the proceeding, the complexity of the claims presented, the defendant's apparent level of intelligence and education, the need for an evidentiary hearing, and the need for substantial legal research.<sup>313</sup>

The best that can be said for the foregoing approach to the appointment of counsel in post-conviction proceedings is that Florida courts have clung tightly to it for half a century. In *State v. Weeks*,<sup>314</sup> decided while the ink with which *Gideon v. Wainwright*<sup>315</sup> was written was scarcely dry, the Florida Supreme Court explained that the post-conviction procedure created in response to *Gideon*, now known as Rule 3.850, was not, strictly speaking, a form of criminal procedure but was “an independent collateral attack upon a criminal court conviction.”<sup>316</sup> That

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2015) (admissibility properly considered on a case by case basis).

<sup>313</sup> Fla. R. Crim. P. 3.850(f)(7). *See also* Fla. Stat. § 924.066(3) (“A person in a noncapital case who is seeking collateral review ... has no right to a court-appointed lawyer”); *Russo v. Akers*, 701 So. 2d 366, 367 (Fla. 5<sup>th</sup> DCA 1997) (“Although there is no absolute right to counsel in a post-conviction proceeding, the Florida Supreme Court has held that due process requires that counsel be provided if a post-conviction motion presents a meritorious claim and a hearing on the motion is potentially so complex that counsel is necessary”). The rule is, understandably, very different in capital cases. *See* Fla.R.Crim.P. 3.851(b).

<sup>314</sup> 166 So. 2d 892 (Fla. 1964).

<sup>315</sup> 372 U.S. 335 (1963).

<sup>316</sup> *Weeks*, 166 So. 2d at 898. The captioned language is from a brief “Clarification of Opinion” appearing at the conclusion of *Weeks*. Earlier in the opinion – in the portion as to which the “Clarification” was directed – the court had simply described such post-conviction litigation as civil proceedings. *Id.* at 897. Although that language may have needed “Clarification,” it was not incorrect. *Habeas* proceedings, and their statutory successors, are civil

being the case, there is no general right to counsel except in those extreme cases in which deprivation of the assistance of counsel would constitute a violation of constitutional due process.<sup>317</sup> Appointment of counsel is discretionary with the post-conviction judge.

Each case must be decided in the light of Fifth Amendment due process requirements which generally would involve a decision as to whether under the circumstances the assistance of counsel is essential to accomplish a fair and thorough presentation of the prisoner's claims. To this end, the court may find that the issues in the post-conviction proceedings have been simplified and are clearly drawn so that a fair hearing could be achieved without counsel. In all of these considerations, however, the proper course would be to resolve doubts in favor of the indigent prisoner when a question of the need for counsel is presented.<sup>318</sup>

A decade and a half later the Florida Supreme Court indicated that it continued to be satisfied with what it had said and done in *Weeks*.<sup>319</sup> It did, however, identify for post-conviction courts certain factors upon which they could rely in making the discretionary decision whether to appoint counsel: "The adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research."<sup>320</sup> As late as 1985, in *Williams v.*

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proceedings.

<sup>317</sup> *Id.* at 896. We are concerned here solely with *court-appointed* counsel. "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, *employed by and appearing for him*, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (emphasis added).

<sup>318</sup> *Weeks*, 166 So. 2d at 897.

<sup>319</sup> *Graham v. State*, 372 So. 2d 1363 (Fla. 1979).

<sup>320</sup> *Graham*, 372 So. 2d at 1366.

*State*,<sup>321</sup> the court determined that even when an evidentiary hearing has been ordered on a post-conviction claim, the claimant is not “automatically” entitled to appointment of counsel;<sup>322</sup> this, despite the *Williams* court’s concession that, “The determination that an evidentiary hearing is necessary in itself implies that three of the four” factors identified in *Graham* are present.<sup>323</sup>

The factors referenced in *Graham* derive from the *Betts v. Brady*<sup>324</sup> line of cases, which governed appointment of counsel in Florida and other state criminal trials prior to *Gideon v. Wainwright*. Pursuant to the *Betts* jurisprudence, the

necessity for the appointment of counsel in order to meet Fourteenth Amendment requirements is influenced largely by the following factors: (1) the gravity of the offense, (2) the nature and complexity of the issue, (3) the age of the defendant, (4) his mental capacity, (5) background, including education and experience, (6) knowledge of law and procedure and, (7) the degree of protection given during the trial as appears from the conduct of the Court or prosecuting officials.<sup>325</sup>

In drafting his brief and preparing his oral argument for the Supreme Court in *Gideon*, Abe Fortas had the good fortune to be assisted by John Hart Ely, at the time a mere law student but later one of the preeminent figures in American legal pedagogy. In a memo to Fortas dated

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<sup>321</sup> *Williams v. State*, 472 So. 2d 738 (Fla. 1985).

<sup>322</sup> *Williams*, 472 So. 2d at 740.

<sup>323</sup> *Id.*

<sup>324</sup> 316 U.S. 455 (1942)

<sup>325</sup> *Jones v. Cochran*, 125 So. 2d 99, 102 (Fla. 1960). *See also Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963); *Sneed v. Mayo*, 66 So. 2d 866 (Fla. 1964).

July 25, 1962, Ely pointed out that although certain of the foregoing factors might be adequately assessed by the judge before trial – the gravity of the offense, for example, or the defendant’s age and level of education – other factors were simply impossible of evaluation until the trial was ongoing, or perhaps concluded.

[A]s to the[se] “retrospective” factors . . . it is not even *theoretically* possible that mortal man can discern these before trial. It is quite impossible that a court will be able to predict pretrial that there will be objections that should be but won’t be raised, that the defendant will fail to make arguments vital to his defense, that a codefendant will plead guilty in mid-trial, that he (the judge) will neglect to give defendant some crucial advice, that the prosecutor will misbehave, that the trial will be too swiftly conducted or that the sentence prescribed will be lighter than that sought by the prosecutor.

(Emphasis in original. Footnote omitted.) The same criticisms could be directed, with comparable force, to the *Weeks/Graham/Williams* line of authority.

But the doctrine of *Weeks/Graham/Williams* is undoubtedly still the law in Florida.<sup>326</sup>

That said, present-day courts seem readier to recognize that it is in everyone's interest – that of the post-conviction claimant, that of the post-conviction court, and that of any reviewing court – that evidentiary proceedings on post-conviction claims be conducted by lawyers.<sup>327</sup> The law of post-conviction practice in Florida is prodigiously complex, and is a mystery even to many

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<sup>326</sup> See, e.g., *Hartfield v. State*, 312 So. 3d 172 (Fla. 1<sup>st</sup> DCA 2021); *Simmons v. State*, 99 So. 3d 620 (Fla. 1<sup>st</sup> DCA 2012). Because a post-conviction claimant can assert no right to counsel, see *Shinn v. Martinez Ramirez*, \_\_\_ U.S. \_\_\_, \_\_\_ (May 23, 2022) (“there is no constitutional right to counsel in state post-conviction proceedings”); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), it follows that there can be no claim for “ineffective assistance of post-conviction counsel.” See *Pennsylvania v. Finley*, 481 U.S. at 555; *Dailey v. State*, 279 So. 3d 1208, 1215 (Fla. 2019); *Kokal v. State*, 901 So. 2d 766 (Fla. 2005). See *gen'ly Davila v. Davis*, 582 U.S. \_\_\_, 137 S.Ct. 2058 (June 26, 2017); *Hunter v. State*, 315 So. 3d 139 (Fla. 5<sup>th</sup> DCA 2021) (also noting that, for the same reason there can be no claim for ineffective assistance of post-conviction counsel, “An *Anders* [v. *California*, 386 U.S. 738 (1967)] brief is unnecessary in post-conviction appeals, and neither we nor appellate counsel need to follow *Anders*'s procedures or requirements”). But cf. *Wessinger v. Warden*, 583 U.S. \_\_\_, 138 S.Ct. 952 (2018) (Sotomayor, J., dissenting from denial of *cert.*).

<sup>327</sup> See, e.g., *Jones v. State*, 324 So. 3d 51 (Fla. 5<sup>th</sup> DCA 2021); *Pacheco v. State*, 290 So. 3d 620, 621 (Fla. 5<sup>th</sup> DCA 2020) (citing *Harvard v. State*, 998 So. 2d 676, 677 (Fla. 4<sup>th</sup> DCA 2009) (“reversing denial of post-conviction counsel where defendant had a fourth-grade education, was confused and unable to articulate positions, and unable to comply with correct procedures, including subpoenaing of witnesses necessary to prove claims”); *Woodward v. State*, 992 So. 2d 391, 393 (Fla. 1<sup>st</sup> DCA 2008) (“reversing denial of counsel for post-conviction claims where proof of claims would require introduction of medical records and expert testimony”)); *Chavez v. State*, 190 So. 3d 255 (Fla. 1<sup>st</sup> DCA 2016); *Jones v. State*, 69 So. 3d 350 (Fla. 1<sup>st</sup> DCA 2011); *Seavey v. State*, 57 So. 3d 978 (Fla. 5<sup>th</sup> DCA 2011). Although post-conviction courts are often well-advised to resolve doubts in favor of the exercise of their discretion to provide counsel at evidentiary hearings on 3.850 claims, it is far from clear that such courts have discretion to provide claimants with common incidental expenses: the costs of depositions, of expert witnesses, and the like. See, e.g., Fla Stat. § 924.051(9): “Funds [or] resources ... of this state or its political subdivisions *may not be used, directly or indirectly*, in ... collateral proceedings unless the use is constitutionally or statutorily mandated.” (Emphasis added.) *McFarlane v. State*, 314 So. 3d 648 (Fla. 3<sup>d</sup> DCA 2021).

lawyers and judges. The likelihood that a post-conviction claimant unlettered in the law but possessed of a meritorious claim – and the fact that an evidentiary hearing was ordered is at least some evidence that the demised claim is not entirely without merit – will be able to navigate the intricacies of Rule 3.850, Chapter 90 of the Florida Statutes, and all the relevant case authority, is remote to the point of non-existence. The likelihood that the hearing will be conducted in an orderly and meaningful fashion, and will result in a record upon which the post-conviction court can meaningfully adjudicate the matter before it, is equally remote. It necessarily follows that the likelihood that the appellate court will be presented with transcripts and records with which it can do something more efficient and constructive than to reverse for rehearing, with instructions that the claimant be represented by counsel at that rehearing, is also remote. Of course it is one of the responsibilities of Florida’s circuit judges to limit, when they can reasonably do so, the financial burdens heaped upon the criminal justice system. But even setting concerns for fairness and for the adversary system of justice aside for the moment, it will simply be cheaper to have one hearing at which both sides are represented by counsel and an intelligible record of proceedings is made, than to have one hearing at which an untutored litigant flounders desperately but ineffectively to make his case; followed by appellate proceedings at which that hearing is deemed inadequate; followed in turn by a second hearing to rectify the inadequacies of the first.

#### V. Claims of ineffective assistance of counsel

Prior to *Strickland*, and certainly prior to *Gideon*, the law’s focus was not on the right to the effective assistance of counsel, but on the right to any assistance of counsel. *Betts* set forth a

multi-factor test by which state-court trial judges were to determine whether they were obliged to provide a lawyer to a defendant who could not afford to hire one. During the two decades between *Betts* and *Gideon* countless such cases arose. Each such case was slightly different than the others. Each such case required the application of *Betts*'s multi-factor test. Conclusions drawn about one such case were likely to be of limited precedential value in the next such case.

This jurisprudential approach pleased no one entirely, and displeased certain justices considerably.<sup>328</sup> Two cases, like *Gideon* originating in Florida, made clear that *Betts*'s days were numbered.

The petitioner in *McNeal v. Culver*<sup>329</sup> was a walking litany of *Betts* factors,<sup>330</sup> and the Court had no difficulty deciding that he should have had the benefit of appointed counsel. But in a separate concurring opinion joined by Justice Brennan, Justice Douglas went further. He flatly declared that *Betts* “was [decided] by a divided Court; and six Justices now sit on the Court who had no hand in fashioning the [*Betts*] rule. I cannot believe that a majority of the present Court

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<sup>328</sup> See, e.g., *Williams v. Kaiser*, 323 U.S. 471, esp. at 476 (1945) (Douglas, J.) (“A layman . . . needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law’s complexity, or of his own ignorance or bewilderment”).

<sup>329</sup> 365 U.S. 109 (1961).

<sup>330</sup> *McNeal* was an uneducated and impoverished African-American living in rural Florida. He suffered head injuries during his military service, and ever after experienced “blackout spells.” *McNeal*, 365 U.S. at 112. He had been in the psychiatric ward of the local Veterans’ Administration hospital, and since his release had been taking “pills” of an unidentified variety. *Id.* He had no prior experience or familiarity with the criminal justice system. *Id.* at 113-14. The statute for the violation of which he was charged “appears to be replete with distinctions and degrees,” *id.* at 114, such that the defendant could not possibly hope to understand or defend against it. He was convicted and sentenced to 20 years. *Id.* at 110.

would agree to *Betts v. Brady* were it here *de novo*.”<sup>331</sup> *Carnley v. Cochran*<sup>332</sup> was the other Florida case in which there were more than ample “considerations of a sort often deemed sufficient to require the conclusion that a trial for crime without defense counsel did not measure up to the requirements of the Fourteenth Amendment,”<sup>333</sup> and in which the Court had no difficulty granting relief even under the *Betts* standard. Concurring, Justice Black announced that, “now is the time to abandon [*Betts*’s] vague, fickle standard for determining the right to counsel . . . . I would overrule *Betts v. Brady* in this case.”<sup>334</sup>

Shortly before *Gideon* came before the Court, Professor Yale Kamisar of the University of Minnesota Law School published a study demonstrating that 37 American states had public defender systems for representation of indigent defendants, and another eight states had various informal procedures in place that amounted to the same thing. Thus there remained but five states that did not provide counsel for defendants in non-capital cases: Alabama, Florida, Mississippi, North Carolina, and South Carolina. And in Florida, three cities – Miami, Ft. Lauderdale, and Tampa – did have public defender offices. Thus the “federalism” argument in defense of *Betts* – the argument that the Supreme Court ought not to be telling the states how to

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<sup>331</sup> *McNeal*, 365 U.S. at 117 (Douglas, J., concurring).

<sup>332</sup> 369 U.S. 506 (1962).

<sup>333</sup> *Carnley*, 369 U.S. at 510.

<sup>334</sup> *Id.* at 519 (Black, J., concurring).

order all the details of their criminal justice systems – had very little remaining applicability to the right-to-counsel issue.

In its brief before the Supreme Court, Florida raised the specter of disastrous consequences resulting from a determination that a felony conviction had without the assistance of counsel was a violation of due process. Specifically, Florida alleged that 5,093 of the 7,836 prisoners then in state custody were unrepresented at trial. If *Betts* were to be overruled, and the decision applied retrospectively, as many as 5,093 of what the State described as “hardened criminals” – apparently all Florida criminals are hardened – might be turned loose.

*Gideon* itself says nothing about whether it should be fully retroactive, or limited in some fashion in its applicability. To its credit, Florida treated *Gideon* as retroactive. By January 1, 1964, 976 Florida prisoners had been released outright, the prosecutorial authorities apparently having concluded that retrial would be pointless or impossible. Hundreds more had filed and were litigating post-conviction motions.

Two decades after *Gideon*, *Strickland* – another Florida case – added the notion of “effective assistance” to the requirement of “assistance of counsel.”<sup>335</sup>

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<sup>335</sup> The term “ineffective assistance of counsel” is not merely a term of art in the law, it is a term for one of the law’s most anomalous anomalies. The lawyer who has rendered service that he, his client, and all informed onlookers recognize to be excellent may yet see that service labeled by the courts as “ineffective assistance of counsel,” while the lawyer who sleeps through his client’s trial may awaken to learn that the courts have determined that his service was not ineffective at all. *Cf., e.g., Burdine v. Johnson*, 262 F.3d 336 (5<sup>th</sup> Cir. 2001) *with Burdine* at 357 (Jolly, J., dissenting) and at 357 *et. seq.*, (Barksdale, J., dissenting). *See also* <https://thehill.com/homenews/438098-federal-judge-rejects-appeal-from-death-row-inmate-whos-e-lawyer-slept-during-trial>. In *Smithey v. State*, 310 So. 3d 1104 (Fla. 5<sup>th</sup> DCA 2020), trial

A. In general.

1. The general rule – the *Strickland* standard

Prior to the industrial revolution, common consumer goods – shoes, for example; or furniture – were made by craftsmen. A young boy might be apprenticed to a master craftsman. After years of apprenticeship he would be elevated to the status of journeyman. As a journeyman, he would travel from master to master, learning from each and assisting each with the supervision of apprentices. At some point he would present himself before the craft guild with his “masterpiece” – a pair of shoes, say, that he had made and upon the basis of which he sought to be elevated in his own right to the rank of master craftsman.

Today shoes are mass-produced by machinery. There is little left in our post-industrial world of crafts, craft guilds, or craftsmanship.

Trial advocacy is the great exception. It is a craft. It cannot be learned or performed by machines of mass production. And although nowadays law schools offer courses in trial advocacy – something that would have been well beneath the dignity of a prominent law school as recently as a generation or two ago – the craft of trial lawyering, if it is truly to be learned,

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counsel rendered, overall, splendid service to their client. Dissenting from the grant of post-conviction relief, Judge Traver detailed all the really excellent work done by trial counsel, and complained of the unfairness of “[t]he majority revers[ing] and remand[ing] for a new trial based on a single strategic decision during four years of sterling representation.” *Smithey*, 310 So. 3d at 1111 (Traver, J., dissenting). The majority conceded that “[t]he dissent is correct that [trial counsels’] representation was, in many respects, competent,” but reminded its dissenting colleague that, “We do not utilize a scale which weighs those actions done well versus those actions which fall below the standard of effective assistance of counsel.” *Id.* 1110-11.

must be learned the old-fashioned way. Young lawyers must be apprenticed to master craftsmen, must work with them and watch them.

The Sixth Amendment guarantee of a right to counsel has never been understood to mean a right to master craftsmanship. A criminal defendant is not deprived of his Sixth Amendment right because his lawyer's opening statement is not on a par with that of Thomas Erskine in defense of John Hadfield, or because his lawyer's closing argument is not on a par with that of Clarence Darrow in defense of Leopold and Loeb.

But neither is the opposite extreme the case. The Sixth Amendment is not satisfied simply because during the course of trial someone possessed of a law degree sits inertly next to the defendant. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command."<sup>336</sup> What is required is considerably more than a department-store mannequin with a law license.

What level of craftsmanship is required? *Strickland*, in which the Court for the first time "consider[ed] the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel,"<sup>337</sup> is the beginning, and still the cynosure, of analysis.

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<sup>336</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>337</sup> *Strickland*, 466 U.S. at 684.

“[N]ot all ineffective assistance of counsel is unconstitutional.”<sup>338</sup> To support a claim of ineffective assistance of counsel, the defendant bears the burden of establishing that his counsel’s performance was deficient, and that the deficiency prejudiced the defendant.<sup>339</sup> Deficient

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<sup>338</sup> *Wright v. State*, 213 So. 3d 881, 904 (Fla. 2017).

<sup>339</sup> See *Andrus v. Texas*, 590 U.S. \_\_\_\_ (2020); *Jones v. State*, 998 So. 2d 573, 582 (Fla. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). See also *Pham v. State*, 177 So. 3d 955 (Fla. 2015). Although *Strickland* has become the eponym for this area of the law – courts routinely refer to the *Strickland* standard or the *Strickland* test – the Florida Supreme Court has taken the position that *Strickland* does not differ significantly from the jurisprudence employed by Florida courts prior to *Strickland*. See *Mikenas v. State*, 460 So. 2d 359, 362 (Fla. 1984) (Adkins, J.) (citing *Knight v. State*, 394 So. 2d 997 (Fla. 1981); *Jackson v. State*, 452 So. 2d 533 (Fla. 1984)).

In his dissenting opinion in *Garza v. Idaho*, 586 U.S. \_\_\_\_ (Feb. 27, 2019), Justice Thomas takes the position that the Sixth Amendment was intended to guarantee no more than the right of a defendant who could afford his own lawyer to be heard through that lawyer in court. *Garza v. Idaho*, \_\_\_\_ U.S. at \_\_\_\_\_. In the course of his dissent, Justice Thomas makes express reference to *Powell v. Alabama*, 287 U.S. 45 (1932) (one of the “Scottsboro Boys” cases); *Gideon v. Wainwright*; and *Strickland*; the fair inference from those references being that those cases were, in Justice Thomas’s view, wrongly decided and should be abandoned. Perhaps; perhaps not. There were no federal crimes (other than treason, defined in the Constitution) until the enactment, on April 30, 1790, of, “An Act for the Punishment of Certain Crimes against the United States.” What is most noteworthy about this first criminal statute is its express provision that judges were to arrange counsel for defendants. The Congress that passed the 1790 Act consisted of many of the same men who participated in the constitutional convention. And even those who did not participate could have been expected to have an understanding of the intention of those who did.

In truth prior to the decision of the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), it was the law in Florida that a defendant represented by a public defender or court-appointed lawyer could make a claim for ineffective assistance, but that a defendant represented by privately-retained counsel could not. See, e.g., *State v. Garmise*, 382 So. 2d 769 (Fla. 3d DCA 1980). This curious dichotomy “rest[ed] squarely on the state’s constitutional obligation, as a matter of due process, to supply effective counsel to a criminal defendant who is financially unable to retain his own counsel.” *Garmise*, 382 So. 2d at 773. Because the state has no such obligation to a solvent defendant who retains his own lawyer, such a defendant could not make a post-conviction claim of ineffective assistance. *Id.* After *Cuyler*, this inequity was abandoned. See, e.g., *Blatch v. State*, 389 So. 2d 669 (Fla. 3d DCA 1980).

performance requires the defendant to show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed ... by the Sixth Amendment,”<sup>340</sup> or that counsel’s performance was “unreasonable under prevailing professional norms.”<sup>341</sup> In order to establish prejudice, the defendant must show that there is a reasonable probability<sup>342</sup> that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.<sup>343</sup>

There is a tendency on the part of post-conviction movants and their

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<sup>340</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>341</sup> *Valle v. State*, 778 So. 2d 960, 965 (Fla. 2001).

<sup>342</sup> A reasonable probability in this context is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

<sup>343</sup> *Jones*, 998 So. 2d at 582. Regarding a showing of prejudice, *see, e.g., Smith v. State*, 310 So. 3d 366, 371 (Fla. 2020) (trial counsel was arguably deficient for failing to move to suppress certain evidence, but “even if counsel had suppressed the evidence . . . the jury still would have heard that Smith had possession of many unique items stolen from the victim’s home . . . . Accordingly, counsel’s alleged failure to file a motion to suppress does not demonstrate a reasonable probability of a different outcome”). *See also Ford v. State*, 321 So. 3d 851 (Fla. 1<sup>st</sup> DCA 2021); *State v. Bush*, 292 So. 3d 18 (Fla. 5<sup>th</sup> DCA 2020).

*NB* that the prejudice that must be shown is prejudice at the trial level. Deficient performance at trial that may compromise the ensuing direct appeal is not prejudice for this purpose. *Tate v. State*, 295 So. 3d 341 (Fla. 2d DCA 2020); *Martin-Godinez v. State*, 290 So. 3d 144 (Fla. 1<sup>st</sup> DCA 2020).

When ineffective assistance of counsel at a probation violation hearing is alleged, the claimant is required to demonstrate “a reasonable likelihood that the outcome of the [probation violation] proceeding would have been ... different” but for counsel’s alleged error. *Flowers v. State*, 947 So. 2d 639, 640 (Fla. 4th DCA 2007).

counsel to couch the issue as one of: Is there something, anything, more that could have been done at the trial level? A moment's reflection will suggest that the application of that standard would render every specimen of lawyering ineffective. There is always, after all, something more that could be done.

[Movant] recurs to his motif: yes, his attorneys litigated this issue, but they rendered ineffective assistance because there must have been something more that could have been done. Did counsel check "GPS cell phone records, [and] pictures from Facebook"? Did they interview "several friends of the defendant?" *Mtn* p. 29. But this is a standard that is never satisfied, a test that is never met. Did they interview "several friends?" Why not all the defendant's friends? And his acquaintances? And everyone in the neighborhood?

Fortunately, this unsatisfiable standard, this unmeetable test, is not the standard, not the test, for effective assistance of counsel. It is trial counsel's job to pursue the strongest leads and arguments of any case – not to try to foreclose specious claims of ineffective assistance by pursuing ever-more-purposeless leads and arguments.

*State v. Dowdy*, Case No. F15-18110 (11<sup>th</sup> Cir. Ct. 2022). And again:

It is, unfortunately, a commonplace in post-conviction motions nowadays for the pleader to take as his or her theme: But there was more that could have been done. Did trial counsel take the depositions of all "A" witnesses? But there was more that could have been done: Counsel could have asked more questions, and then still more questions. And there was more that could have been done: Counsel could have moved the court to reclassify all "B" witnesses so they, too, could be asked questions and still more questions. If this is the standard by which post-conviction claims are to be evaluated, all post-conviction motions must be granted. For there will always be more that could have been done.

Fortunately, however, this is not, decidedly not, the standard for evaluation of post-conviction claims. Mr. Perez recognizes the applicability of the *Strickland* standard: the requirement that he show both deficient legal performance on the part of his trial lawyers and resulting prejudice – outcome-determinative prejudice – to him. Cataloging all the “something more that could have been done” is not the same, not at all the same, as alleging that what was actually done was legally deficient.

*State v. Perez*, Case No. F11-11535B (11<sup>th</sup> Cir. Ct. 2022). As explained in *Strickland*, demonstrating prejudice “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial.”<sup>344</sup> The defendant in *Ferguson v. State*<sup>345</sup> claimed that his trial lawyer rendered ineffective assistance in failing to move for a mistrial after the jury saw Ferguson in leg shackles, and in failing to move to suppress the victim’s identification of him.<sup>346</sup> After the prosecution closed its case, trial counsel called Mr. Ferguson as a witness. It was not until Ferguson walked to the witness stand that counsel realized that his client was wearing shackles. The trial court offered to grant a mistrial; but counsel, after conferring with his client, declined the offer.<sup>347</sup> At the hearing on the post-conviction motion, trial counsel testified that in his estimation the case that the prosecution had presented against Mr. Ferguson was not strong; that a mistrial would afford the prosecution the opportunity to bolster those areas in which its case

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<sup>344</sup> *Strickland*, 466 U.S. at 687.

<sup>345</sup> 316 So. 3d 795 (Fla. 1<sup>st</sup> DCA 2021).

<sup>346</sup> *Ferguson*, 316 So. 3d at 799.

<sup>347</sup> *Id.* at 799.

was weak; and that, overall, he considered the prospect of a retrial more menacing to Ferguson than the damage, if any, done by permitting the jury to see him in shackles.<sup>348</sup>

Apparently the police had presented the victim with a photo lineup. Although the victim was initially hesitant to identify any of the photos, one of the officers encouraged her to make a choice, and she picked the photograph of Mr. Ferguson. “The officer then assured the victim that she had selected the correct person.”<sup>349</sup> Despite this, trial counsel chose not to pursue a motion to suppress “because he concluded that the officers’ conduct went to the weight of the evidence, rather than its admissibility. [Defense counsel] also observed that the victim’s description of her assailant to the police fit Ferguson’s appearance.”<sup>350</sup>

As to the claim of ineffectiveness in trial counsel’s declining the trial court’s offer of a mistrial, the court of appeal found no deficient performance. Trial counsel considered the advantages and disadvantages of mistrial and concluded that in the circumstances it was in Mr. Ferguson’s best interests to press on with the trial. “[A] strategic decision made by counsel after considering and rejecting alternative courses of action does not constitute deficient performance.”<sup>351</sup>

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<sup>348</sup> *Id.* at 800.

<sup>349</sup> *Id.* at 798.

<sup>350</sup> *Id.* at 798.

<sup>351</sup> *Id.* at 799.

By contrast, although trial counsel’s failure to move to suppress the photo identification as impermissible influenced was arguably deficient, it did not give rise to prejudice. There was probable cause for the search of Ferguson’s home. During that search the police found information linking Mr. Ferguson to the victim. Ferguson’s girlfriend corroborated that information. When the police then contacted the victim, she was able to describe with accuracy both Ferguson and the truck he drove. “[T]he trial court determined that Ferguson failed to show prejudice, finding no reasonable probability that the outcome of the trial would have been different had the trial court suppressed the [out-of-court photo] identification.”<sup>352</sup>

There is a strong presumption that trial counsel’s performance was effective.<sup>353</sup> Although the Florida Supreme Court has required that a defendant allege specific facts satisfying both prongs,<sup>354</sup> it has also explained that “there is no reason for a court deciding an effective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.”<sup>355</sup> Rule 3.850(f)(8)(B) provides that, “the defendant shall have the burden of presenting evidence and the burden of proof in support of his or her motion.”<sup>356</sup> “[W]hen a

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<sup>352</sup> *Id.* at 801.

<sup>353</sup> *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2005).

<sup>354</sup> *Jones*, 998 So. 2d at 587.

<sup>355</sup> *Schwab v. State*, 814 So. 2d 402, 408 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 697 (1984)).

<sup>356</sup> *See also Williams v. State*, 974 So.2d 405, 407 (Fla. 2d DCA 2007).

defendant presents competent substantial evidence in support of his ineffective assistance claim, the burden shifts to the State to present contradictory evidence.”<sup>357</sup>

2. The rare exceptions – cases to which the *Strickland* standard does not apply

As a matter of legal theory, there exist cases in which the ineffectiveness of counsel is so complete as to constitute an abandonment by counsel of his function, and therefore an outright deprivation of the defendant’s constitutional right to legal representation.<sup>358</sup> As to such cases, the exacting standard of *Strickland* would not have to be met. But it is a nice question whether *Cronic* exists other than as a matter of legal theory. There appear to be few reported Florida opinions in which *Cronic* was found to be controlling.<sup>359</sup>

In *Parks v. State*,<sup>360</sup> however, the court gave extended consideration to *Cronic* and its progeny. Parks was indicted for first-degree murder and related crimes. He entered into a plea agreement pursuant to which, in exchange for a sentence of 25 years, he obligated himself to

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<sup>357</sup> *Williams*, 974 So. 2d at 407 (citing *Green v. State*, 857 So. 2d 304, 305 (Fla. 2d DCA 2003)). See also *Thomas v. State*, 117 So. 3d 1191, 1194 (Fla. 2d DCA 2013) (“Generally, a defendant has the burden to present evidence at a post-conviction evidentiary hearing, and once he does so, even if only through the presentation of his own testimony, the State must present contradictory evidence”).

<sup>358</sup> See *United States v. Cronic*, 466 U.S. 648 (1984).

<sup>359</sup> See, e.g., *Lambrix v. State*, 217 So. 3d 977, 983-85 (Fla. 2017); *Franklin v. State*, 137 So. 3d 969 (Fla. 2014); *Dennis v. State*, 109 So. 3d 680 (Fla. 2012); *Chavez v. State*, 12 So. 3d 199 (Fla. 2009); *State v. Miller*, 288 So. 3d 1281 (Fla. 5<sup>th</sup> DCA 2020); *Thornhill v. State*, 103 So. 3d 949 (Fla. 4<sup>th</sup> DCA 2012).

<sup>360</sup> 319 So. 3d 102 (Fla. 3d DCA 2021).

testify for the state in the event that his alleged co-perpetrator Jackson were to be prosecuted.<sup>361</sup>

More particularly, his obligation was to testify “truthfully,” by which the prosecution meant consistently with a statement he had previously given to the police.<sup>362</sup>

In due course Jackson was arrested and indicted. The state listed Parks as a witness, and Jackson’s lawyer set Parks for deposition. “At the beginning of the deposition, Parks requested counsel.”<sup>363</sup> The prosecutor declined to arrange for Parks to be represented, and the deposition proceeded. Throughout the deposition, “Parks was reluctant and combative, repeatedly claiming to have little memory of the events surrounding the homicide. Although he was furnished with a copy of the plea contract and his sworn statement, he refused to implicate” Jackson.<sup>364</sup> The trial court subsequently found Parks to be in breach of his plea agreement, vacated the 25-year sentence, and sentenced him to life imprisonment.<sup>365</sup>

The appellate court rightly recognized that the familiar *Strickland* analysis was irrelevant to this case, and looked instead to *Cronic* and *Satterwhite v. Texas*.<sup>366</sup> As the *Parks* court explained, *Cronic* and *Satterwhite* support the proposition that when a criminal defendant is

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<sup>361</sup> *Parks*, 319 So. 3d at 104.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> 486 U.S. 249 (1988).

completely denied counsel, the reliability of the adversarial process itself is, in some circumstances, presumed to be prejudiced.

But the *Parks* court concluded that the deposition at which Parks breached his plea agreement was neither a “critical stage,” as that term is used in the jurisprudence of the Fifth and Sixth Amendments, nor a point at which the complete denial of counsel contaminated the proceedings so as to render prejudice presumptive.<sup>367</sup> Parks had been represented by a lawyer at the time he had entered into his plea agreement, and both the terms of the agreement and the consequences of a breach were no doubt made clear to him by that lawyer. In that sense, in the *Parks* court’s view, there was no deprivation of counsel.<sup>368</sup> Apart from that, “by the time [Parks] was deposed in Jackson’s case, all pretrial procedures [in his own case] had concluded, his guilt or innocence of the charged crime had been decided, [and] his vulnerability to imprisonment had been determined.”<sup>369</sup>

Certainly a contrary view could be taken. Parks appeared for deposition pursuant to subpoena. No, he was not taken to the police station, but his appearance and his testimony were compelled. The record does not indicate whether he was handcuffed during the deposition, or overseen by a corrections officer, but he was certainly brought to the deposition from the jail or prison in which he then resided. It would be difficult to describe his interrogation in deposition

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<sup>367</sup> *Parks*, 319 So. 3d at 108.

<sup>368</sup> *Id.* at 109.

<sup>369</sup> *Id.* at 110 (internal quotation-marks omitted).

as other than custodial. And “his vulnerability to imprisonment” had never been more in play. Any departure from the statement that he had previously given to the police – whether that departure was prompted by fear of retribution by Jackson or Jackson’s well-wishers, by a sudden desire to tell the whole truth even if it meant repudiating the prior statement, or by something else entirely – would, and in the event did, result in a 25-year sentence being converted into a sentence of life in prison. Had a lawyer been present at the deposition, he would surely have asked for a recess and reminded Parks, in stark terms, of the consequences of his recalcitrance. He would have interposed appropriate objections. He would have prevented any bullyragging of the witness. If necessary, he would have sought the court’s intervention to prevent overreaching or injustice. It is possible that none of this would have made any difference. Of course it is possible. But the same could be said of a lawyer’s presence at trial, or at a pre-trial hearing, or at a debriefing prefatory to the entry of a plea agreement. It is always possible that a lawyer’s presence, even if his duties are competently and effectively discharged, will in the end make no difference. That possibility has never been understood to support the disentitlement of a criminal defendant to the assistance of counsel at trial, or at a pre-trial hearing, or at a debriefing prefatory to the entry of a plea agreement. And it is far from clear that it should be understood to support the disentitlement of a criminal defendant to the assistance of counsel at a deposition at which his liberty hangs in the balance – with life imprisonment in the other scale. The *Parks* court, carefully considering the *Cronic* line of authority, concludes that the reliability of the adversarial process was not presumptively compromised here. Other conclusions could be drawn.

James Holcombe was prosecuted along with two of his business associates.<sup>370</sup> The same law firm represented all three men.<sup>371</sup> Prior to trial, Holcombe's co-defendants entered open guilty pleas; the trial court indicated it would sentence them after Holcombe's trial was completed.<sup>372</sup> Although the prosecutor expressed concern that defense counsel were now irremediably conflicted, the trial court took the position that any conflict had been waived.<sup>373</sup> At trial, the two former co-defendants testified against Holcombe and were cross-examined by their own (and Holcombe's) attorneys.<sup>374</sup> Holcombe was convicted and sentenced to ten years.<sup>375</sup>

On direct appeal, Holcombe asserted a deprivation of his Sixth Amendment right to counsel as a consequence of his lawyers' divided loyalties to him and to his accusers. The appellate court, however, took the position that even if a conflict existed, Holcombe was unable to show that he was prejudiced as a result; and that in the absence of prejudice, he was entitled to no relief.

Rule 4-1.7 of the Rules Regulating the Florida Bar, captioned "Conflict of Interest," expressly provides that a lawyer may not represent a client if the representation will be directly

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<sup>370</sup> *Holcombe v. State*, 312 So. 3d 132 (Fla. 5<sup>th</sup> DCA 2020).

<sup>371</sup> *Holcombe*, 312 So. 3d at 133.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* The reported opinion does not indicate what sentences the "flipped" co-defendants got.

adverse to another client. Although there are exceptions made for informed consent, there can be no exception if the representation involves the assertion of a position on behalf of one client that is adverse to another client in the same proceeding. *Holcombe* well illustrates the reason for the rule. A criminal lawyer of even the most rudimentary experience must wince at the thought of what went on during the cross-examination of the co-defendants who testified against Holcombe. Holcombe's hope of acquittal hung on his lawyer's success on cross. Tear the witnesses to shreds and a verdict of not guilty might follow; fail to do so and a verdict of guilty would surely follow. But the same lawyer represented those very witnesses. They had pleaded guilty, and their hope for a lenient sentence would turn on their success in inculcating Holcombe. Their lawyer – Holcombe's lawyer – could serve them by bolstering, not by savaging, their credibility; and by minimizing their roles in the criminal enterprise while maximizing that of Holcombe. No more knowledge of the law than is to be found in *Matthew 6:24* (“No man can serve two masters”) is enough to make plain the ugliness of this ugly picture.<sup>376</sup>

The appellate court, however, took the position that Holcombe was obliged to show prejudice, and that he had not done so. But this serves to underscore the nature of “structural error,” discussed in greater detail in connection with the cases that follow. Whatever the definition of structural error, its two most important characteristics are that it involves or

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<sup>376</sup> After the Florida Supreme Court denied review, Holcombe sought a writ of *certiorari* from the United States Supreme Court. His petition was denied; but Sonya Sotomayor, alone among the justices, wrote a pointed and detailed dissent from denial, *see Holcombe v. Florida*, 595 U.S. \_\_\_\_ (2022), in which she took the position that “reversal of Holcombe’s conviction on appeal should have been automatic,” and that the 5<sup>th</sup> DCA “erred by concluding that Holcombe bore the additional burden of proving an adverse effect on his representation.”

implicates rights the protection of which is so important that a showing of prejudice should not be required; and that it occurs in circumstances in which an accurate assessment of prejudice is impossible to perform.<sup>377</sup> *Holcombe* illustrates the point.

At issue in *Holcombe* was not merely the effectiveness of counsel – not just counsel’s skill and scholarship – but the ethical duty of counsel to provide loyal, uncompromising, and uncompromised representation. In *Holcombe*, there could be no serious debate about the existence of conflict. And where such conflict exists, it cheapens and shames the role of the criminal defense attorney to speak of requiring a showing of prejudice. The entire criminal justice system is prejudiced – and cheapened, and shamed – by the spectacle of a trial in which the same lawyer serves both the defendant and his accusers, and in the end serves neither.

How, in these circumstances, could prejudice possibly be assessed? A principled and accomplished criminal defense attorney might testify that, had he been representing *Holcombe* at trial, he would have asked the following questions on cross-examination of the turncoat co-

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<sup>377</sup> The term “structural error” is associated with Chief Justice Rehnquist’s separate opinion in *Arizona v. Fulminante*, 499 U.S. 279 (1991). Although that opinion does not expressly define the term, it does tell us that, “structural defects in the constitution of the trial mechanism” – for which C. J. Rehnquist offers the example of the deprivation of defense counsel in a criminal case – “defy analysis by ‘harmless-error’ standards.” *Arizona v. Fulminante*, 499 U.S. at 309. By contrast, mere trial error “may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless.” *Id.* at 308-09. The opinion in *Holcombe* notwithstanding, it is difficult to see how the disadvantage visited upon *Holcombe* could possibly be “quantitatively assessed” for “harmless” – or harmful – “error.” If a defendant who has no lawyer undergoes a “structural defect[] in the constitution of the trial mechanism,” doesn’t a defendant who has a lawyer who is also the lawyer for his accusers undergo a similar, if not a worse, “structural defect”?

defendants. But he cannot testify to what answers they would have given, nor to what influence those questions and those answers would have had on the jury. Undoubtedly a lawyer fully committed to Holcombe's defense, and not hobbled by a countervailing commitment to the finger-pointers against him, would have conducted a very different cross-examination than was in fact conducted. But even knowing that, by what yardstick do we measure prejudice?

The error in this case was structural. It compromised, by its very existence, the premises upon which the criminal justice system rests and the processes upon which the criminal justice system relies. But to survey the metes and bounds of the prejudice that inured to Holcombe – to “measure[] out [his] life with coffee spoons”<sup>378</sup> – as a result of what the criminal justice system did to him, and to itself, is impossible.

*Weaver v. Massachusetts*<sup>379</sup> exemplifies a narrow class of cases to which *Strickland*'s prejudice-prong analysis is inapplicable. Weaver was charged in state court with homicide and related crimes.<sup>380</sup> The circumstances of the case necessitated a large venire; and “[a]s all of the seats in the courtroom were occupied by the venire panel, an officer of the court excluded from the courtroom any member of the public who was not a potential juror.”<sup>381</sup> As a result, Weaver's

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<sup>378</sup> T. S. Eliot, *The Love Song of J. Alfred Prufrock*.

<sup>379</sup> 582 U.S. \_\_\_, 137 S.Ct. 1899 (2017).

<sup>380</sup> *Weaver*, 582 U.S. at \_\_\_, 137 S.Ct. at 1902.

<sup>381</sup> *Id.* at \_\_\_, 1906.

mother and her minister were unable to remain in the courtroom during the two-day jury selection.<sup>382</sup> Weaver was convicted at trial and sentenced to life in prison.<sup>383</sup>

Years later, Weaver filed a post-conviction motion claiming that his trial counsel's failure to object to the courtroom closure constituted ineffective assistance, in that it deprived him of his right to an open and public trial.<sup>384</sup> The post-conviction court readily found deficient performance, but denied relief on the grounds that there was no showing of prejudice.<sup>385</sup> But the "violation of the right to a public trial is a structural error,"<sup>386</sup> an error that affects the very framework of trial itself, as opposed to mere trial error.<sup>387</sup> Determination of prejudice is difficult if not impossible. And to make matters worse for Weaver, the error of which he complained had been unpreserved at trial (thus giving rise to the allegation of ineffective assistance) and not raised on direct appeal. In such circumstances, "the burden is on the defendant to show" not prejudice of the *Strickland* sort, but "either a reasonable probability of a different outcome in his or her case, or ... to show that the particular public-trial violation was so serious as to render his

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<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at \_\_\_, 1912-13.

<sup>386</sup> *Id.* at \_\_\_, 1908.

<sup>387</sup> *Id.* at \_\_\_, 1907 (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

or her trial fundamentally unfair.”<sup>388</sup> Weaver, in the Court’s view, was unable to make either showing.

Although [Weaver’s] mother and her minister were indeed excluded from the courtroom for two days during jury selection, [his] trial was not conducted in secret or in a remote place. ... The closure was limited to the jury voir dire; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers rather than the judge; there were many members of the venire who did not become jurors but who did observe the proceedings; and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself.<sup>389</sup>

In *McCoy v. Louisiana*<sup>390</sup> defense counsel deprived his client of a strategic choice that the client and the client alone was entitled to make: the choice whether, in a capital case, “to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence” even at the risk of losing credibility with the jury at the sentencing stage.<sup>391</sup> The consequences of deprivation of such a constitutionally-protected choice are not to be assessed by reference to the *Strickland* test.

Because a client’s autonomy, not counsel’s competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence. ... To gain redress for attorney error, a defendant ordinarily must show prejudice. ... Here, however, the violation of McCoy’s protected autonomy right was complete when the court

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<sup>388</sup> *Weaver*, 582 U.S. at \_\_\_, 1903-04.

<sup>389</sup> *Id.* at \_\_\_, 1903.

<sup>390</sup> 584 U.S. \_\_\_, 138 S.Ct. 1500 (2018). See discussion *infra* at V B 1.

<sup>391</sup> *McCoy*, 584 U.S. at \_\_\_, 138 S.Ct. at 1505.

allowed counsel to usurp control of an issue within McCoy’s sole prerogative.

Violation of a defendant’s Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called “structural.”<sup>392</sup>

Gilberto Garza entered into written plea agreements to resolve his state-court criminal cases.<sup>393</sup> Each such agreement included a provision pursuant to which Garza waived any right to appeal.<sup>394</sup> Those provisions notwithstanding, Garza instructed trial counsel to file a notice of appeal as to the sentences imposed upon him. Counsel – reminding Garza of the appellate waiver conditions of his pleas, and admonishing him that disregard of those conditions could have adverse consequences – filed no notice of appeal.<sup>395</sup> Garza then brought a post-conviction claim of ineffective assistance of counsel.

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<sup>392</sup> *Id.* at \_\_\_, 1510-11. Note that not all structural errors are created equal. Although Weaver was victimized by structural error – the partial deprivation of the right to a public trial – the burden was on him to demonstrate that, as a consequence, his trial was rendered fundamentally unfair. Such a showing is all but impossible to make, and because Weaver was unable to make it he was entitled to no post-conviction relief. By contrast, McCoy and Garza, *see infra*, were entitled to relief simply by virtue of the structural error visited upon them. In *State v. Poole*, 292 So. 3d 694, 700 n. 2 (Fla. 2020), the Florida Supreme Court noted that the United States “Supreme Court decided *McCoy* on direct appeal. Because we have concluded that Poole did not preserve his guilt-phase claim for appellate review, we need not address how *McCoy*’s holding applies in the post-conviction context. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).”

<sup>393</sup> *Garza v. Idaho*, \_\_\_ U.S. \_\_\_, \_\_\_ (February 27, 2019).

<sup>394</sup> *Garza v. Idaho*, \_\_\_ U.S. at \_\_\_.

<sup>395</sup> *Id.* at \_\_\_.

Even on the assumption that counsel's refusal or failure to notice an appeal constituted deficient performance, the State of Idaho had a forcible argument on the issue of prejudice: To obtain relief, argued the State, Garza should at a minimum be obliged to show that he had a colorably meritorious appeal. Absent such a showing, Garza's lawyer's deficient performance was inconsequential in any constitutional sense.

This argument the Court rejected. Traditionally, the decision to take or decline to take an appeal is consigned to a defendant, and not to his counsel, as a matter of right. "[T]he bare decision whether to appeal is ultimately the defendant's, not counsel's, to make."<sup>396</sup> Here, counsel's action (or inaction) in not filing an appeal deprived Garza of a decision that was Garza's to make and of a right that was Garza's to exercise – a specimen of misfeasance (or nonfeasance) analogous, in some sense, to that visited upon McCoy in *McCoy v. Louisiana*. Garza was not obliged to show prejudice to obtain a post-conviction remedy. Rather, in such circumstances, a "presumption of prejudice ... applies regardless of whether the defendant has signed an appeal waiver."<sup>397</sup>

B. Commonly-asserted claims of ineffective assistance of counsel at trial.

As the following sections demonstrate, claims of ineffective assistance of counsel can be brought on myriad grounds. And at the conclusion of a post-conviction motion asserting a

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<sup>396</sup> *Id.* at \_\_\_\_.

<sup>397</sup> *Id.* at \_\_\_\_\_. See also *Whatley v. Warden*, \_\_\_\_ U.S. \_\_\_\_ (April 19, 2021) (Sotomayor, J., dissenting from denial of *certiorari*).

variety of claims of ineffective assistance, it is not uncommon to see a summary claim of “cumulative error” – an allegation that, even if each individual instance of putative ineffectiveness is not enough to merit relief, the various instances lumped together should be. But in this area of the law, the whole is no greater than the sum of the parts: “Claims of cumulative error do not warrant relief where each individual claim of error is ‘either meritless, procedurally barred, or [does] not meet the *Strickland* standard for ineffective assistance of counsel’.”<sup>398</sup>

It would be impossible to provide an inventory of all assertable claims of ineffective assistance of counsel. Some of the claims most commonly made in connection with trial-level representation are considered below.

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<sup>398</sup> *Schoenwetter v. State*, 46 So. 3d 535, 562 (Fla. 2010) (quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)). See also *Dailey v. State*, 279 So. 3d 1208 (Fla. 2019); *Reed v. State*, 326 So. 3d 767, 775 (Fla. 1<sup>st</sup> DCA 2021) (“There must first be error before there can be cumulative error”); *Kirkpatrick v. State*, 346 So. 3d 687 (Fla. 1<sup>st</sup> DCA 2022); *Betty v. State*, 244 So. 3d 364, 366 n. 2 (Fla. 1<sup>st</sup> DCA April 18, 2018) (citing *Morris v. State*, 931 So. 2d 821, 837 (Fla. 2006)); *Pryear v. State*, 243 So. 3d 479, 486 (Fla. 1<sup>st</sup> DCA 2018) (citing *Barnhill v. State*, 971 So. 2d 106, 118 (Fla. 2007)); *Pham v. State*, 177 So. 3d 955, 962 (Fla. 2015) (“As we have previously stated, “where the alleged errors urged for consideration in a cumulative error analysis are individually ‘either procedurally barred or without merit, the claim of cumulative error also necessarily fails’.”) (quoting *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) in turn quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)). Where claims of cumulative error are not procedurally barred, successive, untimely, or the like, however, the Florida Supreme Court “has recognized under unique circumstances that where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to the defendant the fair and impartial trial that is the inalienable right of all litigants.” *Wright v. State*, 213 So.3d 881, 911 (Fla. 2017) (internal quotations and citations omitted). The operative language here is “under unique circumstances.” Claims of cumulative error brought pursuant to Rule 3.850 are as likely to succeed “as for a camel/To thread the postern of a small needle’s eye.” Wm. Shakespeare, *Richard II*, Act V sc. 5.

# 1. Claims of ineffective assistance based on tactical or strategic errors<sup>399</sup>

A common claim of ineffective assistance asserts tactical errors on the part of trial counsel. For merely tactical error to constitute ineffective assistance, the tactical decision at issue must have been, at the time made, so “patently unreasonable that no competent attorney would have chosen it.”<sup>400</sup> Tactical “decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.”<sup>401</sup> The focus, of course, must be on the reasonableness of the tactical decision at the time it was made. In the bright glare of hindsight, all decisions that culminate in bad results seem bad decisions.<sup>402</sup> For this reason, the Florida Supreme Court “has observed that mere disagreement by a defendant’s subsequent counsel with a strategic decision of a predecessor does not automatically result in deficient performance.”<sup>403</sup>

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<sup>399</sup> See *gen’ly Elmore v. Holbrook*, 580 U.S. \_\_\_, 137 S.Ct. 3 (2016) (Sotomayor, J., dissenting from denial of *cert.*).

<sup>400</sup> *Carmona v. State*, 814 So. 2d 481, 482 (Fla. 5th DCA 2002) (quoting *Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997)).

<sup>401</sup> *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). See, e.g., *State v. Smith*, 268 So. 3d 229 (Fla. 1<sup>st</sup> DCA 2019). Cf. *Sierra v. State*, 230 So.3d 48 (Fla. 2<sup>nd</sup> DCA 2017) (trial counsel’s failure to move for mistrial or to accept trial court’s offer of mistrial based on two prosecution witnesses vouching for credibility of victim was outside the range of professionally competent assistance).

<sup>402</sup> See, e.g., *Reynolds v. State*, 99 So. 3d 459, 483 (Fla. 2012); *Majaraj v. State*, 778 So. 2d 944, 959 (Fla. 2000) (citing *Medina v. State*, 573 So. 2d 293, 297 (Fla. 1990)). For the same reason, it is generally not ineffective assistance for a lawyer to fail to anticipate changes in the law. *Smith v. State*, 214 So.3d 703, 705 (Fla. 1<sup>st</sup> DCA 2016) (quoting *Jackson v. Herring*, 42 F.3d 1350, 1359 (11<sup>th</sup> Cir. 1995)). See also *supra* at II D 1 (newly discovered evidence).

<sup>403</sup> *Wright v. State*, 213 So. 3d 881, 909 (Fla. 2017).

The defendant in *Farmer v. State*<sup>404</sup> claimed that his trial counsel was ineffective for failing to object to the placing of a screen between the defendant and the child victim during the victim's testimony.<sup>405</sup> At a hearing on the post-conviction motion, trial counsel testified that the alternatives to permitting the child's testimony to come in in this fashion were permitting the child to testify via closed-circuit television, or obliging the child to testify in open court without the protection of a screen. Trial counsel considered that the child might testify in a more composed manner, and therefore more effectively against the defendant, from a remote location via CCTV. As to the prospect of eliciting the child's testimony in open court without a screen in place, "[t]here was testimony ... that the child was terrified of Farmer" and "would react badly to seeing Farmer" in such a way as to "be incredibly harmful to the defense."<sup>406</sup> Given these bad choices, trial counsel opted for the one he considered least bad.

On appeal from denial of the post-conviction motion, the Fourth District acknowledged that "the use of a screen in this manner violates the defendant's right to a fair trial and may constitute reversible error."<sup>407</sup> But even error of this magnitude may not constitute ineffective assistance. "Farmer has not cited, and we have not found, any authority stating that counsel is *per se* ineffective for failing to object to the use of a screen and cannot consent for reasonable

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<sup>404</sup> 180 So. 3d 1058 (Fla. 4th DCA 2015).

<sup>405</sup> *Farmer*, 180 So. 3d at 1059.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

strategic reasons.”<sup>408</sup> Evidently trial counsel made a carefully reasoned decision in the face of admittedly bad choices. The appellate court necessarily concluded:

that Farmer failed to establish that counsel’s performance was deficient under the norms of professional conduct. Counsel made a reasonable strategic decision to consent to the use of the screen in this case. We also find that Farmer has failed to establish prejudice because he has not demonstrated a reasonable probability that the outcome of the trial would have been different if the child had testified via closed circuit television or in the courtroom without a screen.<sup>409</sup>

By operation of Fla. R. Crim. P. 3.220(h), litigants in Florida criminal cases can take discovery depositions before trial. Of course the decision to take depositions – and which ones to take, and in what order to take them – is tactical in nature. At a hearing on the post-conviction claim at issue in *Gonzalez v. State*,<sup>410</sup> trial counsel conceded that “he does not generally take depositions in criminal cases.”<sup>411</sup> In *dictum*, the appellate court took the position that:

defense counsel’s apparent practice of declining to conduct pretrial depositions can be an effective tactic, depending on the facts of the case, as it can sometimes be to a defendant’s advantage to prepare a defense by investigating the facts without utilizing depositions, which can inform prosecutors of a defense strategy or memorialize

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<sup>408</sup> *Id.* at 1060.

<sup>409</sup> *Id.* See also *State v. Mackendrick*, \_\_\_ So. 3d \_\_\_ (Fla. 1<sup>st</sup> DCA April 20, 2022).

<sup>410</sup> 249 So.3d 1269 (Fla. 1<sup>st</sup> DCA 2018).

<sup>411</sup> *Gonzalez*, 249 So. 3d at 1275.

important information prosecutors may later use to prepare their case.<sup>412</sup>

These observations are correct, although they teeter on proving too much. If trial counsel can explain at a post-conviction hearing what fact investigation he did in lieu of taking depositions, how that fact investigation sufficiently enabled him to prepare his case without the need for depositions, and why his taking depositions might have advantaged the prosecution, then his decisions were indeed tactical and do not give rise to a claim of ineffective assistance of counsel. But if it is simply trial counsel's policy or general rule not to take depositions, and he declined to do so in a given case in reliance on that policy or general rule, then he has not exercised tactical judgment and his failure to take depositions will almost certainly amount to deficient performance. Prejudice resulting from that deficient performance, however, may be hard to prove. "[W]hen a failure to depose is alleged as part of an ineffective assistance of counsel claim, the [defendant] must specifically set forth the harm from the alleged omission, identifying 'a specific evidentiary matter to which the failure to depose witnesses would relate.'"<sup>413</sup>

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<sup>412</sup> *Id.* at 1277.

<sup>413</sup> *Ferrell v. State*, 29 So.3d 959, 969 (Fla. 2010) (quoting *Davis v. State*, 928 So.2d 1089, 1117 (Fla. 2005)). *See also Reed v. State*, 326 So. 3d 767 (Fla. 1<sup>st</sup> DCA 2021). Reed alleged that his trial lawyers were ineffective for failing to take the depositions of victims of collateral crimes. But Reed's allegations were "conclusory and insufficient." *Reed*, 326 So. 3d at 774. "[M]erely asserting that a deposition would have revealed reliability and impeachment issues is not sufficient to warrant post-conviction relief." *Id.* at 775.

It is generally said that an evidentiary hearing is required to determine whether a tactical decision was reasonable in the circumstances.<sup>414</sup> As generalizations go, this is neither better nor worse than most. At the margins – when, for example, it is apparent on the face of the record that no reasonable tactical grounds could have supported trial counsel’s conduct, or when the demised tactical decision was made based on a misapprehension of the law<sup>415</sup> – post-conviction courts may pretermitt a hearing.

It sometimes happens that defense counsel will, as a tactical matter, concede (outright, or by implication) his client’s guilt as to one charged crime in order to bolster his defense as to another.<sup>416</sup> It is black-letter law that there are four decisions that a criminal defendant must make, and that his lawyer cannot make for him: (1) whether to plead guilty; (2) whether to waive trial by jury; (3) whether to testify in his own defense; and (4) whether to take or waive an appeal.<sup>417</sup> Although a criminal trial lawyer is always bound to consult with his client, the myriad

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<sup>414</sup> *White v. State*, 226 So. 3d 349, 351 (Fla. 5<sup>th</sup> DCA 2017) (citing *Santos v. State*, 152 So. 3d 817, 819 (Fla. 5<sup>th</sup> DCA 2014)); *Alford v. State*, 166 So. 3d 219 (Fla. 1<sup>st</sup> DCA 2015); *Pinder v. State*, 804 So. 2d 350, 350 (Fla. 4<sup>th</sup> DCA 2001) (citing *Anthony v. State*, 660 So. 2d 374 (Fla. 4<sup>th</sup> DCA 1995)). *See also* *Martin v. State*, 205 So. 3d 811, 813 (Fla. 2<sup>d</sup> DCA 2016) (citing *Hamilton v. State*, 915 So. 2d 1228, 1231 (Fla. 2<sup>d</sup> DCA 2005); *Chambers v. State*, 613 So. 2d 118, 118 (Fla. 2<sup>d</sup> DCA 1993)); *State v. Williams*, 127 So. 3d 890, 896 (Fla. 1<sup>st</sup> DCA 2013) (collecting cases).

<sup>415</sup> *See, e.g., Garrido v. State*, 162 So. 3d 1069 (Fla. 4<sup>th</sup> DCA 2015); *Floyd v. State*, 159 So. 3d 987 (Fla. 1<sup>st</sup> DCA 2015).

<sup>416</sup> *See, e.g., Mohanlal v. State*, 162 So. 3d 1043 (Fla. 4<sup>th</sup> DCA 2015).

<sup>417</sup> *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983). *See also* Rules Regulating the Florida Bar Rule 4-1.2(a). *But cf. McCoy v. Louisiana, infra*. These four decisions are consigned to the defendant as a matter of constitutional law; as a matter of statute law, the decision to

tactical decisions that arise in the course of even the most ordinary trial are his, and not the defendant's, to make.<sup>418</sup> The trial attorney whose conduct was invigilated in *Florida v. Nixon*<sup>419</sup> was handicapped twice over in his efforts to defend his client. *Nixon* was a capital case, and the evidence of the defendant's culpability as to the charged homicide was overwhelming.<sup>420</sup> To make matters worse, Nixon refused to talk to his lawyer.<sup>421</sup> Trial counsel determined, as a tactical matter, to focus on the penalty phase of the capital proceedings, reasoning that although there was no hope of his getting his client an acquittal, he might possibly save his client's life. In his opening statement, for example, trial counsel admitted that, "there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death,"<sup>422</sup> while at the same time urging the jury instead to consider that, "[t]his case is about the death of Joe Elton

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demand or decline to demand a speedy trial pursuant to Fla. R. Crim. P. 3.191 is also consigned to the client. *See* Fla. R. Crim. P. 3.191(g).

<sup>418</sup> *See, e.g., United States v. Washington*, 198 F.3d 721 (8th Cir. 1999) (decision whether to request a mistrial is a tactical one, and therefore to be made by lawyer, not client); *Poole v. United States*, 832 F.2d 561 (11th Cir. 1987) (decision to stipulate to matter of fact, to avoid having it proven before jury, is for lawyer, not client); *State v. Mecham*, 9 P.3d 777 (Utah App. 2000) (decision to pursue motion to suppress is tactical, and therefore to be made by lawyer, not client); *People v. Williams* 72 Cal. Rptr.2d 58 (Cal. Ct. App. 1998) (defense lawyer authorized to waive formal recitation of reasons for enhanced sentence).

<sup>419</sup> *Florida v. Nixon*, 543 U.S. 175 (2004)

<sup>420</sup> *Nixon*, 543 U.S. at 181 ("Nixon's guilt was not subject to any reasonable dispute") (internal quotation marks omitted).

<sup>421</sup> *Id.* at 189 (referring to "Nixon's constant resistance to answering inquiries put to him by counsel").

<sup>422</sup> *Id.* at 182.

Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.”<sup>423</sup>

Counsel’s frank concessions notwithstanding, the Supreme Court rejected the notion that this was “the functional equivalent of a guilty plea.”<sup>424</sup> The prosecution, after all, was still required to call witnesses (whom defense counsel cross-examined), present evidence, and prove its case beyond and to the exclusion of a reasonable doubt. Defense counsel’s actions constituted a tactical retreat, not a surrender. The guilty plea that the defendant alone can approve – the guilty plea referred to in *Jones v. Barnes*, *supra* – is surrender. Tactical decisions – even those involving retreat – are decisions that lawyers can make.

The precedential value of *Nixon* is limited by the fact, noted *supra*, that Nixon refused to talk to his lawyer. Nixon’s lawyer “fulfilled his duty of consultation by informing Nixon of [defense] counsel’s proposed strategy and its potential benefits. Nixon’s ... silence ... did not suffice to render unreasonable [defense counsel’s] decision to concede guilt and to home in, instead, on the life and death penalty issue.”<sup>425</sup> Of course this passage invites the question: If Nixon *had* been talking to his lawyer, would his criticism or outright rejection of his lawyer’s tactical choice “render [that choice] unreasonable”?

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<sup>423</sup> *Id.* at 182-83.

<sup>424</sup> *Id.* at 188 (quoting *Nixon v. Singletary*, 758 So. 2d 618, 624 (2000)).

<sup>425</sup> *Nixon*, 543 U.S. at 189.

That question, or one very like it, was posed by the facts of *McCoy v. Louisiana*.<sup>426</sup> McCoy was charged with three counts of capital murder.<sup>427</sup> His attorney reasonably concluded that the prosecution evidence was overwhelming, such that an attempt to deny the *actus reus* of the crimes would be fruitless and would curry disfavor with the jury. But McCoy apparently had a history of mental illness. Defense counsel therefore determined to argue during the guilt/innocence phase of the trial that McCoy was incapable of forming the intent required for first-degree murder, and could be convicted only of some lesser degree of homicide.<sup>428</sup> If that failed, defense counsel would at least be well-positioned to urge that McCoy's mental problems were properly considered as mitigation in the sentencing phase of trial.

McCoy, however, repeatedly expressed his dissatisfaction with his lawyer's theory of the defense, and his desire that his lawyer assert McCoy's factual innocence instead.<sup>429</sup> McCoy insisted on testifying at trial, "maintaining his innocence and pressing an alibi difficult to fathom."<sup>430</sup>

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<sup>426</sup> 584 U.S. \_\_\_, 138 S.Ct. 1500 (2018).

<sup>427</sup> *McCoy*, 584 U.S. at \_\_\_, 138 S.Ct. at 1507.

<sup>428</sup> *Id.* at \_\_\_, 1516.

<sup>429</sup> *Id.* at \_\_\_, 1510.

<sup>430</sup> *Id.* at \_\_\_, 1507. *See also id.* at \_\_\_, 1513 (Alito, J., dissenting) ("He claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho. Petitioner believed that even his attorney and the trial judge had joined the plot").

The jury returned verdicts of guilty. In the penalty phase, defense counsel again drew the jury's attention to McCoy's psychological problems; but the jury returned verdicts of death.<sup>431</sup>

The matter reached the Supreme Court on the question “whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection.”<sup>432</sup> The Court recognized that traditionally, the decisions reserved to a criminal defendant as a matter of constitutional law were “whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.”<sup>433</sup> But in *McCoy*, “[a]utonomy to decide that the objective of the defense is to assert innocence” was added to that list.<sup>434</sup>

We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. ... [I]t is the defendant's prerogative, not counsel's to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.<sup>435</sup>

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<sup>431</sup> *Id.* at \_\_\_, 1507.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at \_\_\_, 1508 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

<sup>434</sup> *McCoy*, 584 U.S. at \_\_\_, 138 S.Ct. at 1508.

<sup>435</sup> *Id.* at \_\_\_, 1505. *Cf. Atwater v. State*, 300 So. 3d 589 (Fla. 2020) (“*McCoy* did not hold that counsel is required to obtain the express consent of a defendant prior to conceding guilt. Instead, the Court held that if a defendant ‘expressly asserts that the objective of his defense is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.’”). *See also Recalde v. State*, 338 So. 3d 1039 (Fla. 3d DCA 2022); *Hipley v. State*, 333 So. 3d 1194 (Fla. 5<sup>th</sup> DCA 2022); *Harvey v. State*, 318 So. 3d 1238 (Fla. 2021).

As the foregoing language and the facts of *McCoy* make clear, the Court’s holding is limited to capital cases. “[I]t is hard to see how the right could come into play in any case other than a capital case. ... [T]he right that the Court has discovered is effectively confined to capital cases.”<sup>436</sup> The defendant who can show error as a result of the deprivation of this right, however, need not show prejudice; the error is structural in nature.<sup>437</sup>

The defendant in *Perea v. State*<sup>438</sup> was charged with lewd and lascivious battery. In opening statement, his lawyer:

stated that Perea, who was thirty-one years old, had a consensual relationship with D.A., who was fourteen years old, and that they were in love and wanted to get married. Defense counsel also stated that Perea was from Central America and “in Central America, a man who is 31 usually marries a young woman in her teens.”<sup>439</sup>

Out of the presence of the jury, and at the request of the prosecution, the trial court asked Perea a series of questions about the concessions his attorney had just made. Included among these questions were:

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<sup>436</sup> *McCoy* at \_\_\_, 1514 (Alito, J., dissenting). The *McCoy* holding is limited, at least at this point, to capital cases and to strategic decisions. *McCoy* should not be read beyond its context. Even the simplest of trials involve countless decisions that do not rise to the level of the strategic, but are merely tactical in nature. After *McCoy* as before it, those decisions are consigned to the attorney, and not to the defendant.

<sup>437</sup> See discussion *supra* at V A 2.

<sup>438</sup> *Perea v. State*, 58 So. 3d 284 (Fla. 4th DCA 2011).

<sup>439</sup> *Perea*, 58 So. 3d at 285.

The court: In your attorney's opening [statement] she stated that there was a consensual sexual relationship between you and the victim in this case and that it was based on a loving relationship and that you wanted to get married, correct?

Perea: Yes.

...

The court: When your lawyer, in opening [statement] said that you had this loving consensual sexual relationship with the victim because you were in love and that it was your plan or that you wanted to eventually get married, that defense, you are in agreement with that, correct?

Perea: Yes.<sup>440</sup>

Affirming his conviction on direct appeal over a claim by Perea that his trial lawyer in effect entered a guilty plea on his behalf, the court of appeal opined that, "Perea's attorney did not actually concede his guilt. Defense counsel conceded the facts but never conceded the legal conclusion that Perea was guilty of the crime charged."<sup>441</sup> This is a gossamer distinction. If crime X consists of doing act A with intent-state B, and defense counsel concedes to the trier of fact that his client did act A with intent-state B, it is difficult to see how he has not acknowledged his client's guilt as to crime X. *Nixon* seems to support the proposition that if a lawyer's decision to admit his client's guilt, in whole or in part, is tactically reasonable, then it is a decision the lawyer can make – at least until the client speaks up and repudiates that tactical choice.<sup>442</sup> If that

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<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at 286.

<sup>442</sup> See also *Philmore v. State*, 937 So. 2d 578, 587 (Fla. 2006); *Puiatti v. Secretary, Department of Corrections*, 651 F. Supp.2d 1286, 1309 (M.D. Fla. 2009).

is indeed the teaching of *Nixon*, it should matter little whether the attorney couches his admission in factual terms (“My client slept with a 14-year-old”) or legal ones (“My client committed the crime of lewd and lascivious battery with which he is charged”).

The *Perea* court also concluded that “the trial court’s inquiry here was sufficient,”<sup>443</sup> although affirmance was “without prejudice to Perea filing a Rule 3.850 motion for post-conviction relief.”<sup>444</sup> But in what sense was the trial court’s inquiry “sufficient”? If a lawyer misunderstands the elements of an offense with which his client is charged, then his client, in approving the tactical choice made by the lawyer predicated upon the lawyer’s misunderstanding, gives not informed but misinformed consent. It is a lawyer’s role to make tactical decisions, even including tactical admissions, on behalf of his client. But it cannot be a lawyer’s role to make tactical decisions, including tactical admissions, based on a misapprehension of the elements of the offense with which his client is charged. The lawyer who does so renders deficient representation for purposes of the first prong of the *Strickland* test. That his client approves the tactical decision makes the representation none the less deficient; for the client’s approval is given in reliance upon the lawyer’s misunderstanding.<sup>445</sup>

2. Claims of ineffective assistance based on trial counsel’s failure to locate, discover the testimony of, or call at trial, a particular witness.

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<sup>443</sup> *Perea* at 286.

<sup>444</sup> *Id.*

<sup>445</sup> See also *Benitez-Saldana v. State*, 67 So. 3d 320 (Fla. 2d DCA 2011).

To maintain a claim of ineffective assistance resulting from trial counsel’s failure to adduce the testimony of a particular witness, the post-conviction claimant must establish “the identity of the ... witness, the substance of the witness’s testimony, how the omitted testimony prejudiced [the post-conviction claimant], and that the witness was available for trial.”<sup>446</sup> If trial counsel’s decision not to call a witness was truly tactical – *i.e.*, it was the product of informed and competent consideration by counsel of the advantages and disadvantages of presenting the testimony of the demised witness, and was not simply nonfeasance associated with the failure of counsel to learn about, understand the potential testimony of, or subpoena that witness<sup>447</sup> – it is unlikely that the post-conviction claimant will be entitled to relief.<sup>448</sup> When the testimony of an

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<sup>446</sup> *Gutierrez v. State*, 27 So. 3d 192, 194 (Fla. 5th DCA 2010). *See also LeClaire v. State*, 247 So. 3d 678 (Fla. 2d DCA 2018); *Johnson v. State*, 203 So. 3d 916 (Fla. 3d DCA 2016); *Perez v. State*, 128 So. 3d 223 (Fla. 2d DCA 2013). In *Perez*, the court conceded that the testimony of the uncalled witnesses was “duplicat[ive]” of that of witnesses who actually testified at trial, *Perez* at 225, but “conclude[d] that the testimony of [the uncalled witnesses] would likely have incrementally increased Perez’s credibility with the jury.” *Id.* at 226. *See gen’ly Oropesa v. State*, 104 So. 3d 1183 (Fla. 2d DCA 2012).

<sup>447</sup> In *Chester v. State*, 277 So. 3d 283, 285 (Fla. 5th DCA 2019), the appellate court rejected the post-conviction court’s conclusion “that because the State had subpoenaed [a key witness], it somehow cured defense trial counsel’s failure to do so. There was no indication by the [post-conviction] court of how defense counsel could compel [the witness’s] presence through the State’s subpoena. Furthermore, *defense counsel has an obligation to exercise due diligence to secure a witness’s testimony.*” (Emphasis added.)

<sup>448</sup> This is something that the post-conviction court will likely be obliged to conduct an evidentiary hearing to determine. *See, e.g., Happel v. State*, 330 So. 3d 122 (Fla. 2d DCA 2021); *Washington v. State*, 323 So. 3d 234 (Fla. 5th DCA 2021); *Casanas v. State*, 295 So. 3d 1192 (Fla. 4th DCA 2020); *Rivera v. State*, 264 So. 3d 398 (Fla. 5th DCA 2019); *Kennon v. State*, 261 So. 3d 755 (Fla. 2d DCA 2019); *Robinson v. State*, 176 So. 3d 357, 360 (Fla. 3d DCA 2015) (“It is generally inappropriate to summarily deny such claims upon a finding that counsel’s decision was tactical or strategic”); *Maldonado v. State*, 183 So. 3d 1106, 1107 (Fla. 1st DCA 2015). In *Evans v. State*, 210 So. 3d 704, 705 n. 1 (Fla. 5th DCA 2017), the court noted:

uncalled witness would have been merely cumulative, the general rule is that the failure of trial counsel to call that witness is neither deficient<sup>449</sup> nor prejudicial.<sup>450</sup>

Takendrick Campbell was arrested while lying in the back seat of a parked car with a marijuana cigarette conspicuously in his possession.<sup>451</sup> The arresting officer then searched the interior of the car and found cocaine, oxycodone and MDMA in the seatback pocket of the driver's seat.<sup>452</sup>

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[I]t is generally necessary to hold an evidentiary hearing to determine why trial counsel did not call a particular witness. *See Jacobs v. State*, 880 So. 2d 548, 555 (Fla. 2004); *see also Murrah v. State*, 773 So. 2d 622, 623 (Fla. 1<sup>st</sup> DCA 2000) (“[S]ummary denial is rarely appropriate if the trial court needs to assess the credibility of the new testimony.”); *Evans v. State*, 737, So. 2d 1167, 1168 (Fla 2d DCA 1999) (“A trial court’s finding that defense action or inaction is the result of trial strategy will generally be disapproved if the decision is made without the benefit of an evidentiary hearing,” (citing *Guisasola v. State*, 667 So. 2d 248 (Fla. 1<sup>st</sup> DCA 1995))).

<sup>449</sup> “[F]ailure to present cumulative evidence – even by mere omission rather than decision – does not constitute deficient performance.” *Wright*, 213 So.3d at 909 (citing *Beasley v. State*, 18 So.3d 473, 484 (Fla. 2009)). NB, however, that simply because the testimony of one witness is similar in important ways to that of another does not necessarily mean that the testimony is cumulative. In evaluating cumulativeness, small distinctions may make big differences. *See, e.g., Kennon v. State*, 261 So. 3d 755 (Fla. 2d DCA 2019); *Martin v. State*, 258 So. 3d 567 (Fla. 2d DCA 2018).

<sup>450</sup> *Diaz v. State*, 132 So. 3d 93, 111-12 (Fla. 2013) (“A defendant is not prejudiced by trial counsel’s failure to present cumulative evidence”); *Abney v. State*, 317 So. 3d 1253 (Fla. 1<sup>st</sup> DCA 2021). Of course when the uncalled witness was the defendant himself, different considerations come into play. *See Defuria v. State*, 328 So. 3d 389 (Fla. 2d DCA 2021); *see also* discussion *infra* at V. B. 3.

<sup>451</sup> *Campbell v. State*, 247 So. 3d 102, 104 (Fla. 2d DCA 2018).

<sup>452</sup> *Campbell*, 247 So. 3d at 104.

It was defense counsel's theory of defense at trial that Campbell's mere proximity to these drugs, without more, was insufficient to support a conviction; at the close of the prosecution case in chief, trial counsel moved for judgment of acquittal on that theory. The trial court denied the motion on the grounds that Campbell's possession of the vehicle appeared to be exclusive, thus entitling the prosecution to an inference that Campbell was aware of and had control over the drugs.<sup>453</sup> Defense counsel presented no case and in summation again argued that Campbell's mere proximity to the drugs was not enough for conviction.<sup>454</sup>

In due course Campbell moved for post-conviction relief on the basis of ineffective assistance of counsel. His motion was supported by two affidavits evidencing that two other people had been in the back seat of the car shortly before Campbell was arrested.<sup>455</sup> "The failure [of trial counsel] to present any evidence that Campbell was not the only person in the vehicle that day, and thus to rebut the inference of Campbell's knowledge of and control over the drugs, falls below the standard of reasonably effective counsel."<sup>456</sup> In these circumstances trial counsel's performance was deficient.

At the point during trial when defense counsel announces that he is resting his case without calling any, or any more, witnesses, many trial judges feel moved to question the

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<sup>453</sup> *Id.* at 104 (citing *State v. Odom*, 862 So. 2d 56, 59 (Fla. 2d DCA 2003) and Fla. Std. Jury Instr. (Crim.) 25.2).

<sup>454</sup> *Campbell*, 247 So.3d at 105.

<sup>455</sup> *Id.* at 105.

<sup>456</sup> *Id.* at 108.

defendant on the record to establish his agreement with this decision. Although no particular harm is done by this,<sup>457</sup> nothing much is achieved by it either. As noted *supra*, the decision to call or refrain from calling a witness is, in the first instance, the sort of tactical decision consigned expressly to defense counsel to make. That a defendant, in response to questioning from the bench, expresses no dissatisfaction with that decision at the time it is made does not preclude the defendant from asserting, in a post-conviction motion, that the decision constituted ineffective assistance of counsel. The question is whether counsel's conduct actually fell below professionally-acceptable norms and in so doing actually prejudiced his client's defense; not whether the client once believed the conduct to be professionally acceptable and non-prejudicial. "[A] statement of satisfaction with counsel alone is generally insufficient to conclusively refute a claim that counsel was ineffective for failing to call a witness."<sup>458</sup>

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<sup>457</sup> But see *United States v. Van De Walker*, 141 F.3d 1451 (11th Cir. 1998).

<sup>458</sup> *Evans v. State*, 210 So. 3d 704, 705 n. 1 (Fla. 5<sup>th</sup> DCA 2017) (citing *Law v. State*, 847 So.2d 599, 600-01 (Fla. 5<sup>th</sup> DCA 2003)). See also *Downs v. State*, 227 So. 3d 694 (Fla. 5<sup>th</sup> DCA 2017). In *Reyes v. State*, 342 So. 3d 293 (Fla. 5<sup>th</sup> DCA 2022), trial counsel made a tactical decision not to cross-examine the victim. The trial court questioned Reyes, who of course said that he agreed with that decision. In his post-conviction motion, however, Reyes alleged that his acquiescence was simple reliance on his lawyer's assurance that nothing would be achieved by cross-examining the victim. His motion identified specific areas of cross-examination that could and, arguably, should have been conducted. The trial court's reliance on Reyes's statement of agreement with his lawyer's decision, made during the trial, was not a basis to deny the post-conviction motion. The question before the post-conviction court was whether effective counsel would have cross-examined, and whether Reyes's defense was prejudiced by defense counsel's failure to do so. Those questions could be resolved only by an evidentiary hearing, not by Reyes's at-trial acquiescence in his lawyer's decision.

The First District has sometimes taken the position that if a defendant can be made to say on the record that he concurs in a given tactical decision by his lawyer, he forfeits any post-conviction claim of ineffective assistance based upon that tactical decision, no matter how deficient the decision, no matter how prejudicial the consequences. See, e.g., *Worrell v. State*,

The law differs slightly when the uncalled witness was an expert witness. “Although the defendant is usually required to identify fact witnesses by name, we are aware of no authority requiring the defendant to provide the name of a particular expert where the defendant claims that trial counsel failed to secure an expert in a named field of expertise.”<sup>459</sup> The good sense of this distinction is plain. Typically it is the litigant himself who knows, or knows of, the

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281 So. 3d 1275 (Fla. 1<sup>st</sup> DCA 2019); *Burkhalter v. State*, 279 So. 3d 314 (Fla. 1<sup>st</sup> DCA 2019). In *Burkhalter*,

before the defense put on its case, the trial judge asked the Appellant if he agreed that he and three other witnesses, none of whom were the witnesses at issue, would be the only witnesses called. The Appellant consented on the record to counsel’s strategy to call these three witnesses. That is fatal to his claim. Because the Appellant consented to not calling these four proposed witnesses, the lower court did not err in summarily denying

the post-conviction motion. *Burkhalter*, 279 So. 3d at 316. But the question before the post-conviction court is whether trial counsel, in making the decision consigned to his judgment to call or not call witnesses, demonstrated a level of competence consistent with the constitutional minimum for effective assistance. If trial counsel fell well below that minimum standard in making his decision, his lay client’s acquiescence does not render his ineffective assistance somehow effective. Nor does a defendant, by so acquiescing, waive his constitutional entitlement to effective legal assistance. There is no such thing as “ineffective assistance of client.” *See also infra* at V. D. If Burkhalter’s lawyer’s decision to call or refrain from calling witnesses was within the range of reasonable professional performance, Burkhalter has no claim for post-conviction relief; and this is true without regard to what Burkhalter himself had to say about that decision. If Burkhalter’s lawyer’s decision to call or refrain from calling witnesses was *not* within the range of reasonable professional performance, and if prejudice resulted, Burkhalter has a claim for post-conviction relief; and this is true without regard to what Burkhalter himself had to say about that decision. *See also infra* at V. B. 3.

<sup>459</sup> *Terrell v. State*, 9 So. 3d 1284, 1289 (Fla. 4th DCA 2009); *Miller v. State*, 328 So. 3d 1027 (Fla. 2d DCA 2021). *See gen’ly Burkell v. State*, 169 So. 3d 256, 258 (Fla. 4th DCA 2015).

eyewitness, or the alibi witness, whom he alleges his counsel should have called at trial. By contrast, it is unlikely that the litigant knows the name of a particular specialist in a sub-category of forensic medicine, toxicology, or the like, who might have aided his case.<sup>460</sup> It would probably be sufficient for the post-conviction claimant to make a colorable showing that a qualified expert – any qualified expert – in a given field could have offered testimony of such-and-such a kind, which would have materially benefitted his defense in such-and-such a way; and that trial counsel neglected to give the matter proper consideration.<sup>461</sup>

In adjudicating a claim alleging ineffectiveness for failure to call an expert, Florida courts look to at least three factors: the attorney’s reasons, if known to the court, for not presenting

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<sup>460</sup> *But cf. Townsend v. State*, 201 So. 3d 716 (Fla. 4<sup>th</sup> DCA 2016); *Carmona v. State*, 814 So. 2d 481 (Fla. 5<sup>th</sup> DCA 2002).

<sup>461</sup> *See gen’ly Ibar v. State*, 190 So. 3d 1012 (Fla. 2016); *Kirkpatrick v. State*, 346 So. 3d 687, 693 (Fla. 1<sup>st</sup> DCA 2022) (post-conviction claim facially insufficient because “Kirkpatrick did not allege with specificity what information the experts would have been able to offer and how their testimony would have impacted the case”); *Cooper v. State*, 336 So. 3d 415 (Fla. 2d DCA 2022); *Brown v. State*, 337 So. 3d 454 (Fla. 1<sup>st</sup> DCA Jan. 19, 2022); *Spurgeon v. State*, 298 So. 3d 726 (Fla. 2d DCA 2020); *State v. Lucas*, 183 So. 3d 1027 (Fla. 2016); *State v. Plummer*, 228 So. 3d 661 (Fla. 1<sup>st</sup> DCA 2017). In *Cox v. State*, 189 So. 3d 221, 222 (Fla. 2d DCA 2016), the post-conviction claimant “asserted that his trial counsel was ineffective for not calling a fingerprint expert to rebut the testimony of the State’s fingerprint expert. The State’s expert testified that twelve points on the latent print recovered from [the crime scene] matched Mr. Cox’s left ring fingerprint.” But “Cox’s claim was insufficiently pleaded because he failed to specify how the State’s expert analysis was unreliable and did not state the substance of the proposed [defense] expert’s testimony.” *See also Harrington v. Richter*, 562 U.S. 86, 111 (2011): “*Strickland* does not enact Newton’s third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert’s presentation.”

expert testimony;<sup>462</sup> whether cross-examination of any expert called by the prosecution was sufficient to demonstrate that expert's shortcomings, or to develop the points needed by the defense;<sup>463</sup> and whether the post-conviction claimant can make a showing that an appropriate expert was available at time of trial.<sup>464</sup> It sometimes happens, in a case in which expert testimony was critical to the trial outcome, that post-conviction counsel will obtain an expert who takes a position differing from, even at odds with, that of the trial expert; or will obtain two such experts, or three. It does not follow that trial counsel rendered ineffective assistance. Assuming trial counsel retained a qualified expert, he was entitled to rely on the opinion of that expert, and did not render deficient performance by doing so.<sup>465</sup>

Apart from a claim of ineffectiveness from failing to adduce the testimony of a given witness, post-conviction movants may assert ineffectiveness from failing to perpetuate the testimony of that witness. Rule 3.190(i), Fla. R. Crim. P., provides the procedure for the perpetuation of the testimony of a trial witness. A motion for perpetuation must "be verified or

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<sup>462</sup> *State v. Riechmann*, 777 So. 2d 342, 354 (Fla. 2000) (citing *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987); *Lightbourne v. State*, 471 So. 2d 27, 28 (Fla. 1985)).

<sup>463</sup> *Riechmann*, 777 So. 2d at 354 (citing *Card v. Dugger*, 911 F.2d 1494 (11<sup>th</sup> Cir. 1990)).

<sup>464</sup> *Riechmann*, 777 So. 2d at 354 (citing *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11<sup>th</sup> Cir. 1987)).

<sup>465</sup> "[T]rial counsel is not deficient because the defendant is able to find post-conviction experts that reach different and more favorable conclusions than the experts consulted by trial counsel." *Brant v. State*, 197 So. 3d 1051, 1069 (Fla. 2016) (citing *Diaz v. State*, 132 So. 3d 93, 113 (Fla. 2013); *Wyatt v. State*, 78 So. 3d 512, 533 (Fla. 2011); *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000)).

supported by the affidavits of credible persons” and must relate that the witness as to whom perpetuation is sought either resides beyond the court’s jurisdiction or “may be unable to attend or be prevented from attending” the proceeding at which his testimony is sought. The movant must further represent – again, either in a verified pleading or one supported by affidavits – that the witness’s testimony is material, and that it is necessary to perpetuate the witness’s testimony “to prevent a failure of justice.”<sup>466</sup> And even if all the foregoing requirements are complied with, the perpetuated testimony may not be used at trial if “the attendance of the witness can be procured.”<sup>467</sup>

It therefore follows that for a trial lawyer’s performance to be deficient for failure to seek perpetuation of testimony, the lawyer must have been so nearly certain that the witness would be unavailable at time of trial that he could have signed a verified motion, or solicited affidavits from credible persons, to that effect. The lawyer must also have been prepared to represent to the court, as an officer of the court, that failure to perpetuate testimony would result, not in mere inconvenience or less-than-optimal fact-finding, but rather would result in an outright “failure of justice.”

And it likewise follows that for a lawyer’s deficient performance to have been prejudicial for failure to seek perpetuation of testimony, a post-conviction court must be prepared to conclude that the trial court would have ordered the perpetuation; that the witness would have

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<sup>466</sup> Fla. R. Crim. P. 3.190(i)(1).

<sup>467</sup> Fla. R. Crim. P. 3.190(i)(6).

been unavailable at time of trial and the perpetuated testimony would have been received; and that the lack of that testimony so disadvantaged the defendant as to call into question the post-conviction court's confidence in the trial outcome.

3. Claims of ineffective assistance associated with the defendant's decision to testify, or to refrain from testifying.

The biographer of the great English criminal defense attorney of the last century Edward Marshall Hall records that Hall "gave his [clients] an alternative form to sign: 'I intend to give evidence in this case'; 'I do not intend to give evidence in this case.' Indeed, on more than one occasion [Hall] said that the affirmative choice had led the [defendant] directly to the gallows."<sup>468</sup>

Undoubtedly trial "[c]ounsel may be ineffective in advising defendant not to testify at trial, [particularly] where the defendant's proposed testimony would have been the only evidence establishing a legally recognized defense to the charges."<sup>469</sup> Although the decision to testify or not to testify is one that the defendant himself must make, the Florida Supreme Court in *Morris v. State*<sup>470</sup> excerpted with approval the following language from a federal appellate opinion:

Defense counsel bears the primary responsibility for advising the

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<sup>468</sup> Edward Marjoribanks, For the Defense: The Life of Sir Edward Marshall Hall (1929).

<sup>469</sup> *Tafolla v. State*, 162 So. 3d 1073 (Fla. 4<sup>th</sup> DCA 2015) (citing *Loudermilk v. State*, 106 So. 3d 959 (Fla. 4<sup>th</sup> DCA 2013)); *Visger v. State*, 953 So. 2d 741 (Fla. 4<sup>th</sup> DCA 2007). *See also Carballo v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 3d DCA Nov. 30, 2022) ("Given that there were no other eyewitnesses to the crime and the admitted forensic evidence was overwhelmingly inculpatory, without Carballo's testimony, the jury was arguably left without a reasonable basis for inferring self-defense").

<sup>470</sup> *Morris v. State*, 931 So. 2d 821, 833-34 (Fla. 2006)

defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. ... Moreover, if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify.<sup>471</sup>

In an effort to fend off post-conviction claims on this basis, many trial judges inquire of each defendant if he understands both his right to testify, and his right to refrain from testifying without any adverse inference being drawn against him; if he has discussed the prospect of his testifying thoroughly with his lawyer; if he wishes to have any additional such discussions with his lawyer before reaching a final decision; and if he understands that the final decision, although based on the advice of counsel, must be his and his alone. The Florida Supreme Court has stated repeatedly that such a colloquy is not required.<sup>472</sup> Somewhat contradictorily, however:

In *dictum* ... [the court] cautioned that to avoid postconviction disputes “it would be advisable for the trial court, immediately prior to the close of the defense’s case, to make a record inquiry as to whether the defendant understands he has a right to testify and that it is his personal decision, after consultation with counsel, not to take the stand.”<sup>473</sup>

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<sup>471</sup> *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992). *See also Johnson v. State*, 239 So. 3d 135 (Fla. 3d DCA 2018).

<sup>472</sup> *Torres-Arboledo v. State*, 524 So. 2d 403 (Fla. 1988). *See also Lott v. State*, 931 So. 2d 807, 818 (Fla. 2006) (collecting cases); *State v. Medina*, 118 So. 3d 944 (Fla. 3d DCA 2013); *cf. United States v. Van De Walker*, 141 F.3d 1451 (11th Cir. 1998).

<sup>473</sup> *Lott*, 931 So. 2d at 818 (quoting *Torres-Arboledo*, 524 So. 2d at 411 n. 2).

The trial judge in *McClenney v. State*<sup>474</sup> included, in her colloquy of the defendant, the following:

If you were to testify, I do know, just by virtue of the fact that there was a charge for carrying a firearm by a career criminal, that you must have felony convictions. I don't know how many, but the jury would learn if you were to testify. If you answer questions truthfully, they would only learn two things. The prosecutor could ask you have you ever been convicted of felony, and your answer would be yes; and if so, how many times, and I would ask the lawyers to confer with each other to make sure it's accurate so that you're well informed how many times. And if your answer is truthful, they can't go any further into that.<sup>475</sup>

The appellate court was so taken with this particular feature of the colloquy that it noted:

We include this aspect of the colloquy for a separate but significant reason: Trial courts often encounter post-conviction motions asserting ineffective assistance of counsel based on the allegation that counsel affirmatively misadvised the defendant that, should he testify at trial, the jury would be told the specific details of the prior crime(s) for which he was previously convicted. . . .

However, by engaging in a colloquy such as the one conducted in the instant case, a trial court can help ensure defendant is adequately informed about the consequences of his decision to testify . . . while also eliminating this as a potential issue in any future post-conviction claim . . . . Trial court judges should be encouraged to make such a colloquy a standard part of their trial

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<sup>474</sup> \_\_\_\_ So. 3d \_\_\_\_ (Fla. 3d DCA Nov. 23, 2022).

<sup>475</sup> *McClenney*, \_\_\_\_ So. 3d at \_\_\_\_.

procedure.<sup>476</sup>

Even if a defendant, properly catechized, gives all the right answers, he may yet assert a meritorious post-conviction claim of ineffective assistance. Establishing that the defendant's decision not to testify was his own decision, freely and voluntarily made, is but half the battle. "If that is established, then the trial court must answer the separate and second question which is whether counsel's advice to defendant 'even if voluntarily followed, was nevertheless deficient because no reasonable attorney would have discouraged [defendant] from testifying'."<sup>477</sup>

The defendant in *Riggins v. State*<sup>478</sup> was sifted thoroughly by the trial court as to his decision not to testify in his own defense. When Riggins subsequently brought a post-conviction claim alleging ineffective assistance of counsel in connection with his decision not to testify, the post-conviction court denied it, concluding that Riggins's decision not to testify had been his own, voluntarily made.<sup>479</sup> But as the court of appeal pointed out:

[T]he waiver of the right to testify at trial will not, *ipso facto*, waive a defendant's claim that he was improperly advised by counsel concerning that right. Instead, a defendant who elects not to testify at trial may still state a facially sufficient claim of ineffective assistance of counsel if the defendant can allege and prove "that trial counsel's preparation for his testimony was

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<sup>476</sup> *Id.* at \_\_\_, n. 3.

<sup>477</sup> *Simon v. State*, 47 So. 3d 883, 885 (Fla. 3d DCA 2010) (Cope, J.) (quoting *Lott*, 931 So. 2d at 819). See also *Marshall v. State*, 277 So. 3d 756 (Fla. 1<sup>st</sup> DCA 2019); *Hodges v. State*, 260 So. 3d 458 (Fla. 5<sup>th</sup> DCA 2018); *Roberts v. State*, 307 So. 3d 808 (Fla. 2d DCA 2018).

<sup>478</sup> 168 So. 3d 322 (Fla. 2d DCA 2015).

<sup>479</sup> *Riggins*, 168 So. 3d at 324.

deficient such that it deprived [the defendant] of the ability to choose whether to testify on his own behalf and that this deficiency prejudiced [the defendant].” ... In short, a defendant’s decision not to testify at trial does not, as a matter of law, waive a later claim that his trial counsel improperly advised him concerning the contours of that right.<sup>480</sup>

As with other tactical decisions, the post-conviction court will likely have to convene a hearing to determine whether trial counsel’s advice was based on sound tactical considerations, rather than, say, a misapprehension of the applicable law or relevant facts. If counsel’s advice is found to be deficient, the post-conviction claimant will still have to show that he was prejudiced.<sup>481</sup> The post-conviction claimant in *Williams v. State*<sup>482</sup> alleged that his trial lawyer

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<sup>480</sup> *Id.* (internal citation omitted). The appellate court also rejected the post-conviction court’s determination that Riggins’s testimony, had he given it, would have been merely cumulative to that of other witnesses. A “defendant’s testimony cannot be ‘cumulative’ because the impact of a defendant’s own testimony is qualitatively different from the testimony of any other witness.” *Id.* at 325. *Defuria v. State*, 328 So. 3d 389 (Fla. 2d DCA 2021).

<sup>481</sup> See, e.g., *Oisorio v. State*, 676 So. 2d 1363, 1364 (Fla. 1996) (“a defendant claiming ineffective assistance of counsel based on counsel’s interference with his right to testify must meet both prongs of *Strickland*,” i.e., both the deficient performance and the prejudice prong). The post-conviction claimant in *Hill v. State*, 226 So. 3d 1085 (Fla. 1<sup>st</sup> DCA 2017)

alleged that his testimony would have provided an innocent explanation for the presence of his DNA on the firearm used in the offenses [for which he was convicted]. He asserted that this testimony could have explained and minimized the only objective evidence that established his guilt, leaving the state to rely on the testimony of codefendants who were testifying pursuant to plea deals and an eyewitness who identified one of his codefendants as the shooter. He claimed that absent his testimony, there was no chance for his defense to succeed.

*Hill*, 226 So. 3d at 1086. This was more than sufficient to plead prejudice and to require an

advised him that if he testified in his own defense the jury would learn not only of the fact of his prior convictions but also of the nature of those convictions.<sup>483</sup> Whether that advice, if actually given, was correct or not depends on the crimes for which Williams had been convicted. Florida Stat. § 90.610 provides for impeachment by prior felony conviction; and by misdemeanor conviction as to misdemeanors involving dishonesty or false statement only. Because Williams’s motion failed to identify all of his criminal convictions, it was impossible for the court to know whether he had misdemeanor convictions involving dishonesty or false statement, and therefore impossible for the court to determine whether trial counsel’s advice was deficient or not.<sup>484</sup> And by omitting to set forth a summary of the testimony he would have given had he testified, Williams failed to establish prejudice.<sup>485</sup>

Compare *Watson v. State*,<sup>486</sup> in which the defendant alleged that his “trial counsel advised him that he did not need to testify at trial because [trial] counsel could adequately present his claim of self-defense in closing arguments.”<sup>487</sup> This “advice was both erroneous and prejudicial

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evidentiary hearing.

<sup>482</sup> 175 So. 3d 349 (Fla. 3d DCA 2015).

<sup>483</sup> *Williams*, 175 So. 3d at 350. See also *Floyd v. State*, 299 So. 3d 594 (Fla. 2<sup>nd</sup> DCA 2020); *Penton v. State*, 262 So. 3d 253 (Fla. 2d DCA 2018); *Gordon v. State*, 181 So. 3d 1193, 1194 (Fla. 4<sup>th</sup> DCA 2015).

<sup>484</sup> *Williams*, 175 So. 3d at 350-51.

<sup>485</sup> *Id.* at 351.

<sup>486</sup> 175 So. 3d 375 (Fla. 1<sup>st</sup> DCA 2015).

<sup>487</sup> *Watson*, 175 So. 3d at 376.

because, without Watson’s testimony, there was no evidence from which the jury could find that Watson acted in self-defense.”<sup>488</sup>

Hearings on post-conviction motions often occur years, sometimes many years, after trial or plea. A defense attorney, called to testify at a post-conviction hearing, may have only the most general recollection of the advice that he gave at that long-ago trial or plea. Sometimes he has less even than that. He may recall little or nothing of what he told this particular defendant in this particular case; he can testify only to his general practice regarding advice to clients in criminal cases. *Morales v. State*<sup>489</sup> dealt with just such a situation.

Morales asserted ineffective assistance of trial counsel, “claim[ing] that he did not testify at his trial because his trial counsel incorrectly advised him that the nature of his prior felony convictions would be admissible as impeachment evidence, rather than just the number of convictions.”<sup>490</sup> At the hearing on Morales’s motion, trial counsel testified that although she had no specific recollection of her conversations with her client, she had notes confirming that she had discussed with Morales several times the prospect and consequences of his testifying, “and that her regular practice is to correctly inform her clients of the law on this issue.”<sup>491</sup> She also testified to her extensive criminal-defense experience. The post-conviction court, relying on

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<sup>488</sup> *Id.* at 376.

<sup>489</sup> 308 So. 3d 1093 (Fla. 1<sup>st</sup> DCA 2020).

<sup>490</sup> *Morales*, 308 So. 3d at 1095.

<sup>491</sup> *Id.*

counsel's experience and her regular practice regarding advice to clients, denied Morales's motion.

The First District affirmed. “We . . . hold that the trial court may disbelieve the defendant's testimony and may consider a trial attorney's general practice as evidence when making a factual finding about specific conversations between the attorney and client.” Here, the post-conviction court heard the testimony of both Morales and his trial lawyer and chose to believe the trial lawyer. That was a credibility determination that the post-conviction court was entitled to make on the record before it.<sup>492</sup> Had the post-conviction court reached the contrary conclusion – had it chosen to believe Morales's specific assertions that he had not been properly informed of the consequences of his trial testimony over trial counsel's general assertions of her customary practice in such situations – that, too, would have been a credibility determination that the post-conviction court would have been entitled to make. *Morales* does not create a rule that a lawyer's testimony as to her habits as a practitioner are always sufficient to defeat a post-conviction claimant's testimony as to what he remembers being told before his trial or plea. Nor does it create the contrary rule, viz., that such testimony by the trial lawyer is never sufficient to overcome the post-conviction claimant's recollections. The issue is one of credibility; and as is always true when credibility is at issue, each case will turn on its own facts.

#### 4. Claims of ineffective assistance of counsel for failure to demand speedy trial.

As with other claims of ineffective assistance of counsel, a litigant alleging

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<sup>492</sup> *But cf. Campbell v. State*, 247 So. 3d 102 (Fla. 2d DCA 2018); *Polite v. State*, 990 So. 2d 1242 (Fla. 3d DCA 2008).

ineffectiveness resulting from his trial lawyer's failure to assert his statutory or constitutional speedy trial rights must show both deficient performance and resultant prejudice.<sup>493</sup> In *Ryland v. State*,<sup>494</sup> for example, the post-conviction claimant alleged that his trial counsel failed to file a notice of expiration of his statutory speedy trial rights on or after the 175<sup>th</sup> day following his arrest.<sup>495</sup> As a result, the prosecution had time to locate and arrest his co-defendants, at least one of whom then entered into a plea deal with the prosecution and testified against Ryland at trial.<sup>496</sup> Similarly, in *Gee v. State*,<sup>497</sup> the post-conviction litigant made a sufficient assertion of deficient performance by alleging "that counsel twice failed to file a notice of expiration of speedy trial time prior to moving for dismissal on speedy trial grounds;"<sup>498</sup> and a sufficient assertion of prejudice by noting "that the trial judge expressed doubt about finding a jury during the Rule 3.191 recapture period,[<sup>499</sup>] but denied the motion to dismiss because defense counsel had failed to follow the proper procedure."<sup>500</sup>

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<sup>493</sup> See, e.g., *Steel v. State*, 266 So. 3d 1252 (Fla. 1<sup>st</sup> DCA 2019).

<sup>494</sup> 880 So. 2d 816 (Fla. 1st DCA 2004).

<sup>495</sup> See Fla. R. Crim. P. 3.191(a) ("every person charged with a crime shall be brought to trial ... within 175 days of arrest if the crime charged is a felony"); Fla. R. Crim. P. 3.191(h), (p)(2) (regarding notices of expiration).

<sup>496</sup> *Ryland*, 880 So. 2d at 817.

<sup>497</sup> 13 So. 3d 68 (Fla. 1st DCA 2009).

<sup>498</sup> *Gee*, 13 So. 3d at 69.

<sup>499</sup> See Fla. R. Crim. P. 3.191(p)(3).

<sup>500</sup> *Gee*, 13 So. 3d at 69.

Typically the difficulty for the post-conviction litigant claiming ineffective assistance in connection with the failure to assert speedy trial rights will lie in demonstrating prejudice. At least one Florida appellate court has described as “extremely tenuous” the prospect of showing prejudice if the recapture window was still available to the prosecution.<sup>501</sup> Prejudice exists if the prosecution could not have brought the defendant to trial during the recapture period,<sup>502</sup> or if “the quality of the State’s case within the recapture window would have been diminished so severely that there is a reasonable probability that the movant would have been acquitted or convicted of a lesser crime if the State had been forced to proceed.”<sup>503</sup> Although a facially-sufficient claim may necessitate a hearing to afford trial counsel an opportunity to explain his conduct, in “rare” instances “prejudice to the movant may be apparent” – as in *Gee, supra*, in which trial counsel “twice failed to file a notice of expiration of speedy trial time prior to moving for dismissal on speedy trial grounds ... and the trial judge expressed doubt about finding a jury during the ... recapture window.”<sup>504</sup>

##### 5. Claims of ineffective assistance resulting from trial counsel’s failure to raise the issue

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<sup>501</sup> *Hammond v. State*, 34 So. 3d 58, 60 (Fla. 4th DCA 2010) (a “claim of ineffective assistance of counsel based on a failure to seek discharge because of a violation of the speedy trial rule is extremely tenuous where the State had available the recapture window of Rule 3.191(p)(3)”). See also *Remak v. State*, 142 So. 3d 3, 6 (Fla. 2d DCA 2014) (excerpting the foregoing language from *Hammond* with approval).

<sup>502</sup> *Dexter v. State*, 837 So. 2d 595, 596 (Fla. 2d DCA 2003).

<sup>503</sup> *Remak*, 142 So. 3d at 6 (citing *Ryland*, 880 So. 2d at 817).

<sup>504</sup> *Remak* at 7 (citing *Gee* at 69). See also *Wells v. State*, 881 So. 2d 54 (Fla. 4th DCA 2004).

of the defendant's competence at trial.

The failure of trial counsel to raise or investigate the issue of his client's competence at trial may give rise to a claim of ineffective assistance of counsel.<sup>505</sup> To establish deficient performance, the post-conviction movant must show that a reasonably competent attorney would have questioned his client's competence to proceed, *viz.*, would have questioned, "whether the defendant ha[d] sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant ha[d] a rational, as well as factual, understanding of the [trial] proceedings."<sup>506</sup>

The prejudice analysis, however, is diacritical in this context.

The issue is not whether, had counsel acted differently, the court would have been required to hold a competency hearing ... . The focus of the prejudice inquiry is on actual prejudice, whether, because of counsel's deficient performance, the defendant's substantive due process right not to be tried while incompetent was violated. In order to establish prejudice in a properly raised ineffective assistance of counsel claim, the postconviction movant must ... set forth clear and convincing circumstances that create a

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<sup>505</sup> *Akins v. State*, 247 So. 3d 687 (Fla. 1<sup>st</sup> DCA 2018). *See gen'ly Andujar-Sanchez v. State*, 264 So. 3d 290 (Fla. 1<sup>st</sup> DCA 2019); *Perez v. State*, 306 So. 3d 126 (Fla. 2d DCA 2018); *Brown v. State*, 250 So. 3d 764 (Fla. 1<sup>st</sup> DCA 2018); *Anderson v. State*, 183 So. 3d 1146 (Fla. 5<sup>th</sup> DCA 2015). The issue of competence itself must be raised at trial and on direct appeal, and if not so raised is procedurally barred on collateral attack. *See Allen v. State*, 212 So. 3d 1112 (Fla. 1<sup>st</sup> DCA 2017). What is typically, and properly, raised on post-conviction motion is a claim of ineffective assistance of counsel for *failure* to raise the issue of competence at trial.

<sup>506</sup> *Thompson v. State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012) (quoting Fla. R. Crim. P. 3.211(a)(1)). *See also Roberts v. State*, 306 So. 3d 1188 (Fla. 1<sup>st</sup> DCA 2020); *Turem v. State*, 220 So. 3d 504 (Fla. 5<sup>th</sup> DCA 2017).

real, substantial and legitimate doubt as to the movant's competency.<sup>507</sup>

This is a very exacting standard. The “real, substantial and legitimate doubt as to ... competency” that the post-conviction claimant must show relates back to the time of trial. Post-conviction claims are often brought years, sometimes many years, after the trial, judgment, and sentence that they seek to attack. Locating and adducing testimony and evidence that will establish “clear[ly] and convincing[ly]” that a litigant may have been incompetent at the time of a long-ago trial may be – likely will be – a daunting task.

#### 6. Miscellaneous claims of ineffective assistance

Averments of ineffective assistance of counsel are routinely made for such things as the alleged failure adequately to impeach a trial witness,<sup>508</sup> or the failure to file a putatively meritorious pretrial motion.<sup>509</sup> Double jeopardy claims, although litigable on direct appeal, may be raised by post-conviction motion, a violation of double jeopardy being a deprivation of a

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<sup>507</sup> *Thompson*, 88 So. 3d at 319.

<sup>508</sup> See, e.g., *Lowe v. State*, 2 So. 3d 21, 30 (Fla. 2008); *Delarosa v. State*, 24 So. 3d 741 (Fla. 2d DCA 2009); *William v. State*, 673 So. 2d 960 (Fla. 1<sup>st</sup> DCA 1996).

<sup>509</sup> *Abdool v. State*, 220 So. 3d 1106 (Fla. 2017); *Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011); *Madison v. State*, 278 So. 3d 921 (Fla. 5<sup>th</sup> DCA 2019); *Zanchez v. State*, 84 So. 3d 466 (Fla. 2d DCA 2012); *Ramos v. State*, 559 So. 2d 705 (Fla. 4<sup>th</sup> DCA 1990); *Sorey v. State*, 463 So. 2d 1225 (Fla. 3d DCA 1985). Of course “[t]rial counsel cannot be held to have been ineffective for not making meritless motions.” *Dickerson v. State*, 285 So. 3d 353, 358 (Fla. 1<sup>st</sup> DCA 2019) (citing *Whitted v. State*, 992 So. 2d 352 (Fla. 4<sup>th</sup> DCA 2008)). See also *Jefferson v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 2d DCA Dec. 2, 2022). “[C]ounsel cannot be deemed ineffective [when] any motion to suppress would have been meritless.” *Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011) (citing *Kormondy v. State*, 983 So. 2d 418, 430 (Fla. 2007); *Fitzpatrick v. State*, 900 So. 2d 495, 511 (Fla. 2005)).

constitutionally-protected right.<sup>510</sup> Currently in vogue are motions claiming ineffective assistance in connection with trial counsel's failure to request jury instructions on lesser-included offenses. As to such claims, the better rule is that the jury's verdict of conviction as to the charged offense negates as speculative any possible claim of prejudice arising from failure to request a lesser-included offense; such a claim may be summarily denied.<sup>511</sup>

In *McGhee v. State*<sup>512</sup> the defendant's girlfriend, the victim of his crimes, gave testimony at trial that was not terribly consequential. On cross-examination, however, the prosecutor impeached her with the details of a statement she had given shortly after the events.<sup>513</sup> Those details were damaging indeed. In his post-conviction motion, McGhee argued that his trial counsel had been ineffective for failing to request that the trial court give a limiting instruction to the jury, explaining that the girlfriend's out-of-court statement came in solely to impeach her in-

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<sup>510</sup> See, e.g., *Gammage v. State*, 277 So. 3d 735 (Fla. 2d DCA 2019); *Richardson v. State*, 301 So. 3d 1014 (Fla. 2d DCA 2019); *Rodriguez v. State*, 162 So. 3d 1162, 1164-65 (Fla. 5<sup>th</sup> DCA 2015); *Wilson v. State*, 693 So. 2d 616, 617 n.2 (Fla. 2d DCA 1997). Of course if double jeopardy was raised and adjudicated on direct appeal, that would constitute the law of the case.

<sup>511</sup> *Sanders v. State*, 946 So. 2d 953 (Fla. 2007). See, e.g., *Woods v. State*, 306 So. 3d 1236 (Fla. 1<sup>st</sup> DCA 2020); *Grandison v. State*, 276 So. 3d 43 (Fla. 1<sup>st</sup> DCA 2019). But see *Maksymowska v. State*, 310 So. 3d 1053 (Fla. 2d DCA 2020); *Ferguson v. State*, 128 So. 3d 136 (Fla. 5<sup>th</sup> DCA 2013). Separate and apart from the issue of instructions on lesser-included offenses, failure to object to erroneous instructions, or to request instructions to which the defendant was entitled and from which he might have benefitted, can of course give rise to a claim of ineffectiveness. See, e.g., *Washer v. State*, 284 So. 3d 1134 (Fla. 5<sup>th</sup> DCA 2019); *Bolduc v. State*, 279 So. 3d 768 (Fla. 2d DCA 2019); *Romero v. State*, 276 So. 3d 514 (Fla. 5<sup>th</sup> DCA 2019).

<sup>512</sup> 307 So. 3d 815 (Fla. 5<sup>th</sup> DCA 2020).

<sup>513</sup> *McGhee*, 307 So. 3d at 817.

court testimony, and not as substantive evidence of McGhee’s guilt.<sup>514</sup> The appellate court remanded for an evidentiary determination whether trial counsel made a tactical determination not to seek the limiting instruction, or whether his failure to do so was inadvertent and thus arguably deficient.<sup>515</sup>

McGhee had a second claim of ineffectiveness relating to failure to request a proper jury instruction. Trial counsel neglected to request the portion of a standard jury instruction providing that in order to find a defendant guilty of burglary, the jury must find that the defendant was not licensed or invited to enter the structure.<sup>516</sup> Although the appellate court went so far as to hold that trial “counsel was ineffective in failing to request this instruction and that, under *Strickland*, [McGhee] was prejudiced,” it remanded for further proceedings.<sup>517</sup>

In *Corbett v. State*<sup>518</sup> the post-conviction movant claimed that his trial attorney was ineffective for failing to make an adequate motion for judgment of acquittal, *see* Fla. R. Crim. P. 3.380. Such a claim requires a showing by the movant that he, “may very well have prevailed on a more artfully presented motion for acquittal based upon the evidence he alleges was presented

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<sup>514</sup> *Id.* at 818, citing Fla. Stat. § 90.107, which provides that, “[w]hen evidence that is admissible as to one party or for one purpose, but inadmissible as to another party or for another purpose, is admitted, the court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted.”

<sup>515</sup> *McGhee*, 307 So. 3d at 818-19.

<sup>516</sup> *Id.* at 819.

<sup>517</sup> *Id.* at 820. *See also Claudio-Martinez v. State*, 324 So. 3d 45 (Fla. 2d DCA 2021).

<sup>518</sup> 267 So. 3d 1051 (Fla. 1<sup>st</sup> DCA 2019).

against him at trial.”<sup>519</sup> “Because conflicts in the evidence and the credibility of the witnesses have to be resolved by the jury, the granting of a motion for judgment of acquittal cannot be based on evidentiary conflict or witness credibility.”<sup>520</sup>

For DNA evidence to be admissible in a Florida criminal trial, the proponent must lay a sufficient foundation as to both the biochemical conclusions and the statistical conclusions of its witness or witnesses. In *Cruz v. State*,<sup>521</sup> the defendant sought post-conviction relief on his claim that the prosecution had elicited no testimony from its expert witness to support her statistical conclusions, and that defense counsel failed to make an appropriate objection or to seek *voir dire* as to that lack of sufficient foundation.<sup>522</sup> “Nothing in the attachments to the post-conviction court’s order demonstrates that [the State’s witness] testified about her knowledge of the population database from which the statistics were generated or that she identified the method she used to perform the statistical analysis.”<sup>523</sup> A sufficient objection, or *voir dire*, by defense counsel would have obliged the prosecution to demonstrate its witness’s knowledge of population databases, and of the general acceptance in the scientific community of the statistical calculation used to inculcate Cruz. Because there was no such objection, Cruz’s post-conviction

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<sup>519</sup> *Corbett*, 267 So. 3d at 1057 (quoting *White v. State*, 977 So. 2d 680, 681 (Fla. 1<sup>st</sup> DCA 2008) (in turn quoting *Neal v. State*, 854 So. 2d 666, 670 (Fla. 2d DCA 2003)).

<sup>520</sup> *Id.* (quoting *Hitchcock v. State*, 413 So. 2d 741, 745 (Fla. 1982)).

<sup>521</sup> 262 So. 3d 244 (Fla. 2d DCA 2018).

<sup>522</sup> *Cruz*, 262 So. 3d at 247 *et. seq.*

<sup>523</sup> *Id.* at 249.

motion was adequate at least to entitle him to a hearing; for which purpose the case was remanded.

During jury selection, a lawyer who believes in good faith that his opponent is exercising a peremptory challenge in a discriminatory manner may trigger an inquiry by the court, and possibly even a ruling disallowing the challenge, if he carefully follows the choreography of *Melbourne v. State*.<sup>524</sup> But a claim of ineffective assistance of counsel for failure to make such an objection, “is not normally a basis for post-conviction relief.”<sup>525</sup> “[T]he prejudice prong cannot be proven absent some indication that the jury that actually served was biased.”<sup>526</sup>

In *Martin v. State*<sup>527</sup> the Florida Supreme Court had occasion to consider “the standard for evaluating post-conviction claims of juror misconduct based on the juror’s nondisclosure of information during *voir dire*.”<sup>528</sup> Martin was charged with first-degree murder and armed robbery. In jury selection the prosecutor “asked the potential jurors about prior arrests, including

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<sup>524</sup> 679 So. 2d 759 (Fla. 1996).

<sup>525</sup> *Pryear v. State*, 243 So. 3d 479, 482 (Fla. 1<sup>st</sup> DCA 2018) (citing *Jones v. State*, 10 So.3d 140, 141-42 (Fla. 4<sup>th</sup> DCA 2009)).

<sup>526</sup> *Pryear*, 243 So.3d at 483 (citing *Yanes v. State*, 960 So.2d 834, 835 (Fla. 3d DCA 2007); *Jenkins v. State*, 824 So.2d 977, 984 (Fla. 4<sup>th</sup> DCA 2002)). See *Patrick v. State*, 246 So.3d 253, 263 (Fla. 2018). Of course if there were evidence that racial or other prejudice actually infected the jury’s deliberative process, a criminal defendant convicted on the basis of that deliberative process would not be obliged to wait till the post-conviction stage of proceedings to seek redress; he could move to set aside the verdict. See *Pena-Rodriguez v. Colorado*, 580 U.S. \_\_\_, 137 S.Ct. 855 (2017).

<sup>527</sup> 322 So. 3d 25 (Fla. 2021).

<sup>528</sup> *Martin*, 322 So. 3d at 29.

prior arrests of the potential jurors' close friends or family members.”<sup>529</sup> A venireman named Smith, who ultimately served on the jury, offered no responses. In truth Smith as a minor had been adjudicated delinquent for sexual battery, and half-a-dozen years later had a DUI conviction. Additionally, when he was only ten years old, Smith's grandmother had murdered his grandfather.<sup>530</sup>

A criminal defendant in Florida has a right to be tried by an impartial jury pursuant to both Art. I §16(a) of the Florida constitution and the Sixth and 14<sup>th</sup> Amendments to the United States Constitution. It was the deprivation of that right that Martin asserted as the basis of his post-conviction claim.<sup>531</sup> The *Martin* court held that such a claim obliged the post-conviction movant to show that the demised juror had answered a question dishonestly – not merely mistakenly, but dishonestly.<sup>532</sup> “[A] mistaken but honest answer to a question – either because the juror mistakenly believed his answer was correct or because the question was unclear – will not warrant post-conviction relief.”<sup>533</sup> And even if the post-conviction movant can show the requisite dishonesty on the part of a juror, he must also show actual prejudice, *i.e.*, that the juror

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<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> Martin did not assert a claim of ineffective assistance of counsel, *viz.*, he did not allege that his trial counsel's failure to elicit from Smith, or otherwise ferret out, the truth about Smith's background constituted deficient performance. *Id.* at 32, n. 5.

<sup>532</sup> *Id.* at 35.

<sup>533</sup> *Id.* at 35.

in question was not impartial as contemplated by the Florida and United States Constitutions.<sup>534</sup>

These determinations – whether a juror who actually served was both willfully untruthful in his responses in *voir dire* and whether that juror was prejudiced rather than impartial in the discharge of his duties – will likely require an evidentiary hearing.<sup>535</sup> Such an evidentiary hearing, however, is made doubly difficult because it must be conducted in compliance with Fla. Stat. § 90.607(2)(b), Florida’s present-day iteration of the common-law rule that a juror is incompetent to impeach the verdict.<sup>536</sup> The rule bars post-verdict inquiry into the “jurors’ emotions, mental processes, or mistaken beliefs” to the extent subsumed in the verdict.<sup>537</sup> The post-conviction court, in conducting its evidentiary hearing, must permit the movant a reasonable opportunity to establish that false answers given by a juror were willfully rather than merely inadvertently false; but in so doing, may not permit inquiry into the juror’s “mental processes.” The post-conviction judge may well conclude that, “A mote will turn the balance.”<sup>538</sup>

Defense counsel in *Patrick v. State*<sup>539</sup> failed to strike a juror who was concededly

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<sup>534</sup> *Id.* at 35.

<sup>535</sup> *Id.* at 36.

<sup>536</sup> *Boyd v. State*, 324 So. 3d 908 (Fla. 2021).

<sup>537</sup> *Boyd*, 324 So. 3d at 914. *See also id.* at 915, n. 4.

<sup>538</sup> Wm. Shakespeare, *Midsummer Night’s Dream*, Act V sc. 1.

<sup>539</sup> 302 So. 3d 734 (Fla. 2020).

prejudiced<sup>540</sup> against Patrick because of Patrick’s sexual orientation.<sup>541</sup> It remained to be determined whether that failure to strike constituted deficient performance. At the hearing before the post-conviction court, lead trial counsel testified that:

although he did not have a significant independent recollection of the trial or recall of his thought process at the time, he had no reason to believe that the juror in question should have been stricken. In addition, [he] testified that he had never left a juror on

the panel without a strategic basis for doing so unless he had no remaining peremptory strikes, in which case he would have asked for more.<sup>542</sup> The foregoing notwithstanding, lead counsel did identify reasons why keeping the juror might have been advantageous to the defense.<sup>543</sup>

The only other witness to testify at the post-conviction hearing was the second-chair defense counsel. She testified that no juror was kept or stricken without Patrick’s approval.<sup>544</sup>

“[T]he trial record reflects that at the end of *voir dire* Patrick told the court that he was ‘fine’

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<sup>540</sup> As is common nowadays, the *Patrick* court referred to the juror as being “biased against” Patrick. See, e.g., *Patrick*, 302 So. 3d at 736, 737. Traditionally, the law uses “bias” to refer to an inclination or disposition *in favor of* a person or thing, and “prejudice” to refer to an inclination or disposition *against* a person or thing. See, e.g., <https://wikidiff.com/prejudice/bias>.

<sup>541</sup> *Patrick*, 302 So. 3d at 736-37.

<sup>542</sup> *Id.* at 738. As it happens, counsel “mistakenly thought he had no peremptory strikes left when the panel was finally determined . . . but he expressly stated on the trial record that he was not seeking additional peremptory strikes.” *Id.* at 738 n. 2.

<sup>543</sup> *Id.* at 739. The Florida Supreme Court took the position that “a specific recollection is not necessary to support a finding that the attorney was . . . employing a specific strategy. . . . The attorney’s confident testimony about what his thought process must have been is sufficient.” *Id.* at 743.

<sup>544</sup> *Id.* at 739.

with the jury and that his attorneys had consulted with him about the jurors.”<sup>545</sup>

In evaluating for deficient performance in this context, the Florida Supreme Court focused on two questions: whether competent, substantial evidence supported the post-conviction court’s determination that trial counsel’s failure to strike an admittedly prejudiced juror was a tactical decision; and if so, whether the juror’s demonstrated prejudice was so severe as to render that tactical decision objectively unreasonable.<sup>546</sup> The Court readily concluded that the post-conviction court’s conclusions were supportable and the trial counsel’s decisions reasonable.

What is troubling is the Court’s repeated emphasis on Patrick’s involvement in the jury selection process, and his seeming approval of the jury actually selected. As noted *supra*, the Court, in its opinion, expressly referred to the testimony of second-chair counsel in this particular. And returning to this theme at the end of the opinion, the Court made a point of:

not[ing], too, that Patrick was actively and intelligently involved in the jury selection, as reflected by [lead counsel’s] testimony and his contemporaneous notes, as well as the testimony of [second-chair counsel]; that [lead counsel] testified that he would have discussed all the issues that came up at the post-conviction evidentiary hearing with Patrick at the time of jury selection if Patrick had said he wanted to strike this juror; and that Patrick advised the trial court at the end of jury selection that he was “fine” with the panel and had discussed it with his attorneys.<sup>547</sup>

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<sup>545</sup> *Id.* at 739, 740.

<sup>546</sup> *Id.* at 742.

<sup>547</sup> *Id.* at 744.

A claim of ineffective assistance of counsel is cognizable under Rule 3.850 because both the Florida and federal Constitutions guarantee a criminal defendant the right to the assistance of counsel, meaning the right to the effective assistance of counsel. Neither constitution guarantees a criminal defense attorney the right to the effective assistance of client. Jury selection decisions – the decision to strike or accept a given venireperson – are tactical decisions, consigned exclusively to counsel. If defense counsel, as a courtesy, whispers to his client, “I’m definitely going to exercise a peremptory challenge against Jones,” and the client insists that the lawyer accept Jones, the lawyer has not merely the authority but the absolute duty to tell the client to be still – that he, the lawyer, will make those jury selection decisions that he deems best. If counsel were to defer to his client’s demand and accept Jones, it would be an abdication, not an exercise, of tactical judgment. And an abdication of tactical judgment is the essence of deficient performance.

It was good client management on the part of Patrick’s lawyer to explain to Patrick what choices he was making in jury selection and to solicit Patrick’s concurrence. But that’s all it was. It may have fostered better attorney-client relations and helped Patrick adopt a more confident air in front of the jury, but it didn’t relieve Patrick’s lawyer of his duty to exercise an objectively reasonable level of tactical discretion.

And suppose Patrick had said that he was less than “fine” with his attorneys’ jury-selection choices. Would that bear at all upon the quality of the lawyers’ performance? The standard by which that performance is to be measured is, as the *Patrick* court recognized, an

objective one. The question is whether the lawyers’ tactics were consistent with what is to be expected of a sufficiently experienced, sufficiently prepared, sufficiently skilled criminal trial lawyer – not whether those tactics met with the approval of the layman whom that lawyer represents. The obvious inability of an untrained and likely uneducated criminal defendant, in the moment when his liberty and perhaps his life hang in the balance, to make tactical decisions about his defense; and the obvious unfairness of requiring him to do so; are precisely why “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him. . . [L]awyers in criminal courts are necessities, not luxuries.”<sup>548</sup> It is the courts, viewing the matter dispassionately in retrospect, and not the defendant “in the very torrent, tempest, and . . . whirlwind”<sup>549</sup> of trial, that must determine whether defense counsel did at least as much as the Sixth Amendment requires of him. A defendant’s opinion that, for example, he was “fine” with the jury selection, forms no part of that determination.<sup>550</sup>

The recent opinion of the Supreme Court of Florida in *Davis v. State*<sup>551</sup> may prove a fertile source of post-conviction claims. In *Davis*, the court, abandoning a long line of authority and tradition of practice to the contrary, ruled that a trial court may, in imposing sentence, hold

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<sup>548</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>549</sup> Wm. Shakespeare, *Hamlet* Act III, sc. 2.

<sup>550</sup> *See also Miller v. State*, 331 So. 3d 1268 (Fla. 2d DCA 2022).

<sup>551</sup> 332 So. 3d 970 (Fla. 2021).

against a defendant that defendant's failure to accept responsibility or express remorse for the crime of which he was convicted.<sup>552</sup>

Picture, then, the attorney-client conference that must take place sometime between the return of a guilty verdict and the date of sentencing. Defendant asks his lawyer what will happen at the sentencing hearing. The lawyer explains that the defendant may, but need not, allocute and express profound remorse for his crime. If he declines to do so, the judge may impose a higher sentence. If he does so, it's possible – by no means guaranteed, but possible – that the judge will impose a lower sentence – but of course there would be no purpose in prosecuting an appeal at that point. By accepting responsibility the defendant will have, in effect, confessed to the crime for which he was convicted. Even if an appeal were granted, conviction at retrial would be a laughably foregone conclusion.

So what do I do?, the beleaguered defendant asks. His lawyer explains that the decision to allocute or to remain silent is a decision for the client and not for the lawyer. Sputtering with exasperation, the defendant demands to know: what would *you* do? What do you *advise me* to do?

The lawyer will consider all relevant factors, such as the sentencing tendencies of the judge (does he or she impose a sentencing premium on those who fail to express remorse? Or grant a sentencing discount for those who do?); the strength of any appeal; and most vexing of all, whether there is a basis to believe that the defendant is truly innocent and wrongfully

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<sup>552</sup> *Davis*, 332 So. 3d at 978.

convicted. On the basis of his consideration of these and like-kind factors, he will advise his client. If he advises his client to allocute and express remorse, and the judge afterwards imposes a draconian sentence (and to the defendant, any sentence may seem draconian), a post-conviction claim will surely follow. If he advises his client to remain silent so as to preserve his prospects on appeal and at retrial, and the appeal fails, a post-conviction claim will surely follow. Yes, the judge at time of sentencing will question the defendant so as to render the post-conviction claim less difficult to dispose of. (Do you understand that you have both the right to allocute, and the right to refrain from allocution? Do you understand that the decision to do the one and not the other is your and yours alone? Have you discussed his decision with your lawyer? Has he answered all your questions? And so on.) Yes, at the ensuing hearing the lawyer will testify that he explained all options to the client carefully, and made his recommendation to the client based on his best tactical judgment; which will be almost certainly sufficient to enable the court to deny the post-conviction motion. But the motion will have been filed, and the hearing will have been conducted, and the whirligig of the criminal justice system will have been made to spin and spin again.

C. Claims of ineffective assistance in connection with plea, rather than trial.

1. Generally; herein of involuntariness of the plea<sup>553</sup>

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<sup>553</sup> Although claims of ineffective assistance in connection with a plea of guilty or no contest, *see* Fla. R. Crim. P. 3.850(a)(1), and claims of involuntariness of the plea, *see* Fla. R. Crim. P. 3.850(a)(5), are often brought together; and although they are, for this reason, discussed together here; these are two very different kinds of claims. *See* discussion *infra*.

To plead a claim of ineffective assistance of counsel in connection with a guilty or *nolo contendere* plea, a defendant must satisfy the two-prong test of *Hill v. Lockhart*.<sup>554</sup> The first prong is the familiar deficient performance prong of *Strickland*.<sup>555</sup> The prejudice prong, however, requires a showing that “there is a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial.”<sup>556</sup>

The petitioner in *Lee v. United States*<sup>557</sup> was brought from Korea to the United States by his family while still a child. In the 35 years that he resided in this country he remained a lawful permanent resident but never became a citizen.<sup>558</sup>

In 2008 Lee was indicted on federal drug charges. He retained a lawyer who engaged in plea discussions with the prosecution. Lee “repeatedly asked [his lawyer] whether he would face deportation as a result of the criminal proceedings,”<sup>559</sup> making it clear that avoiding deportation was his principal litigation goal. Incredible as it seems, the lawyer assured Lee that a plea of

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<sup>554</sup> 474 U.S. 52 (1985).

<sup>555</sup> *Grosvenor v. State*, 874 So. 2d 1176 (Fla. 2004). See, e.g., *Louima v. State*, 247 So. 3d 564 (Fla. 4<sup>th</sup> DCA 2018); *Wilhelm v. State*, 253 So. 3d 736 (Fla. 1<sup>st</sup> DCA 2018).

<sup>556</sup> *Grosvenor v. State*, 874 So. 2d at 1179 (citing *Hill v. Lockhart*, 474 U.S. at 59-60). See also *Godwin v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 4<sup>th</sup> DCA Nov. 16, 2022); *Graham v. State*, 174 So. 3d 617 (Fla. 1<sup>st</sup> DCA 2015); *Lara v. State*, 170 So. 3d 133 (Fla. 5<sup>th</sup> DCA 2015).

<sup>557</sup> 582 U.S. \_\_\_, 137 S.Ct. 1958 (2017).

<sup>558</sup> *Lee*, 582 U.S. at \_\_\_, 137 S.Ct. at 1963.

<sup>559</sup> *Id.*

guilty would not result in deportation.<sup>560</sup> Based on this advice, Lee entered a plea of guilty and was sentenced. Shortly – and inevitably – thereafter, he learned that he was subject to mandatory deportation. He promptly filed a post-conviction claim alleging ineffective assistance of counsel in connection with his plea.<sup>561</sup>

That trial counsel’s representation had been deficient was uncontested.<sup>562</sup> The sole issue was whether Lee could show prejudice under the *Hill v. Lockhart* standard. It was Lee’s position that, “he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States.”<sup>563</sup> In other words,

Lee alleges that avoiding deportation was *the* determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation – even if it shaved off prison time – in favor of throwing a “Hail Mary [pass]” at trial.<sup>564</sup>

The Court was satisfied that, in the circumstances, Lee had made an adequate showing that, but for his trial lawyer’s deficient and erroneous advice, he would have chosen to take his chances at trial; and that he was therefore prejudiced.

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<sup>560</sup> *Id.*

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at \_\_\_, 1962.

<sup>563</sup> *Id.* at \_\_\_, 1966.

<sup>564</sup> *Id.* at \_\_\_, 1967.

We cannot agree that it would be irrational for a defendant in Lee’s position to reject the plea offer in favor of trial. But for his attorney’s incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the “determinative issue” for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that “almost” could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. ... Not everyone in Lee’s position would make the choice to reject the plea. But we cannot say it would be irrational to do so.<sup>565</sup>

Compare *Mallet v. State*.<sup>566</sup> Mallet was charged with over a hundred counts of possession of images depicting sexual conduct by a child, plus other crimes. Prior to trial the defense moved to dismiss certain of the charges; the motion was denied.<sup>567</sup> Mallet then entered into a plea, believing that his right to appeal the denial of his motion to dismiss had been preserved.<sup>568</sup> At

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<sup>565</sup> *Id.* at \_\_\_, 1969. Virtually identical to *Lee* is *Alsubaie v. State*, 268 So. 3d 1013 (Fla. 1<sup>st</sup> DCA 2019). For a fascinating discussion of issues akin to those that arose in *Lee*, but that antedates *Lee* by more than six decades, see *United States v. Parrino*, 212 F. 2d 919 (2d Cir. 1954).

Left unanswered by *Lee* is whether a defendant situated as Lee was can demonstrate prejudice, for purposes of his post-conviction claim, by showing that, had his attorney properly advised him as to deportation consequences, there is a reasonable probability that he could and would have negotiated a plea agreement that did not carry such consequences. All federal appellate courts to have considered this question have answered it in the affirmative. See *Rodriguez-Penton v. United States*, 905 F. 3d 481, 488 (6<sup>th</sup> Cir. 2018) (collecting cases).

<sup>566</sup> 270 So. 3d 1284 (Fla. 1<sup>st</sup> DCA 2019).

<sup>567</sup> *Mallet*, 270 So. 3d at 1284.

<sup>568</sup> See Fla. R. App. P. 9.140(b)(2)(A)(i) (“A defendant who pleads guilty or *nolo contendere* may expressly reserve the right to appeal a prior dispositive order of the lower

sentencing, however, he learned that his attorney had failed to preserve this issue. The court sentenced Mallet to forty years in prison followed by probation.<sup>569</sup>

On appeal from denial of post-conviction relief, the court focused on the issue of prejudice rather than that of deficient performance. In Mallet’s case, “the evidence against [him] was formidable, and he and his counsel recognized that his chances of acquittal were slim.”<sup>570</sup> Mallet “knew he faced a maximum sentence of six hundred fifteen years in prison. Even if his counsel had reserved the right to appeal, and Mallet had successfully obtained dismissal of the ... counts [as to which the motion to dismiss was directed], he still faced five hundred eighty-five years in prison.”<sup>571</sup> The standard of prejudice is not subjective; it looks to what a reasonable defendant would do in the circumstances.<sup>572</sup> Faced with the prospect of hundreds of years of incarceration in the event of conviction and no better than a slim chance at trial, a reasonable defendant would not be prejudiced by a plea outcome of forty years plus probation.

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tribunal, identifying with particularity the point of law being reserved”).

<sup>569</sup> *Mallet*, 270 So. 3d at 1284.

<sup>570</sup> *Id.* at 1286.

<sup>571</sup> *Id.*

<sup>572</sup> Apart from being objective, the standard requires consideration, not of a single evidentiary artifact, but of the entirety of the evidence – not merely, for example, an admissible and newly-discovered evidentiary artifact, but all the evidence that was or would have been presented at trial as well as that evidentiary artifact. *See, e.g., State v. Jesus*, \_\_\_ So. 3d \_\_\_ (Fla. 2d DCA Nov. 30, 2022).

In *Alcorn v. State*<sup>573</sup> the Florida Supreme Court, in reliance on then-recent precedent from the United States Supreme Court,<sup>574</sup> set out a new test for prejudice in cases in which the deficient performance is trial counsel's misadvice, or failure to advise, regarding a plea offer and its legal consequences.

We hold that in order to show prejudice, the defendant must demonstrate a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.<sup>575</sup>

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<sup>573</sup> *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013). See also *Jacques v. State*, 193 So. 3d 1065 (Fla. 4<sup>th</sup> DCA 2016).

<sup>574</sup> *Missouri v. Frye*, 566 U.S. 133 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012).

<sup>575</sup> *Alcorn*, 121 So. 3d at 422. See *gen'ly Jefferson v. State*, \_\_\_ So. 3d \_\_\_ (Fla. 2d DCA Dec. 2, 2022); *Sullins v. State*, 327 So. 3d 1269 (Fla. 5<sup>th</sup> DCA 2021); *Williams v. State*, 323 So. 3d 359 (Fla. 2d DCA 2021); *Lewis v. State*, 319 So. 3d 56 (Fla. 4<sup>th</sup> DCA 2021); *Alexander v. State*, 303 So. 3d 221 (Fla. 4<sup>th</sup> DCA 2020); *Jean Baptiste v. State*, 289 So. 3d 561 (Fla. 2d DCA 2020); *Forbes v. State*, 269 So. 3d 677 (Fla. 2d DCA 2019); *Rish v. State*, 268 So. 3d 233 (Fla. 5<sup>th</sup> DCA 2019); *Ogden v. State*, 273 So. 3d 162 (Fla. 1<sup>st</sup> DCA 2019); *Taylor v. State*, 248 So. 3d 280 (Fla. 5<sup>th</sup> DCA 2018); *Casiano v. State*, 232 So. 3d 526 (Fla. 5<sup>th</sup> DCA 2017); *Montgomery v. State*, 231 So. 3d 599 (Fla. 1<sup>st</sup> DCA 2017); *Phillips v. State*, 229 So. 3d 426 (Fla. 2d DCA 2017); *Parenti v. State*, 225 So. 3d 949 (Fla. 5<sup>th</sup> DCA 2017); *Carter v. State*, 225 So. 3d 881 (Fla. 1<sup>st</sup> DCA 2017); *Smith v. State*, 219 So. 3d 978 (Fla. 1<sup>st</sup> DCA 2017); *Bynes v. State*, 212 So.3d 1134 (Fla. 4<sup>th</sup> DCA 2017); *Petit-Homme v. State*, 205 So. 3d 848 (Fla. 4<sup>th</sup> DCA 2016); *Lamb v. State*, 202 So. 3d 118 (Fla. 5<sup>th</sup> DCA 2016); *Mitchell v. State*, 197 So. 3d 1271 (Fla. 2d DCA 2016); *Paul v. State*, 198 So. 3d 999 (Fla. 4<sup>th</sup> DCA 2016); *Brown v. State*, 138 So. 3d 510 (Fla. 4<sup>th</sup> DCA 2014); *State v. Yeomans*, 172 So. 3d 1006 (Fla. 1<sup>st</sup> DCA 2015); *State v. Sirota*, 147 So. 3d 514 (Fla. 2014). See also *Gordon v. State*, 286 So. 3d 833, 834 (Fla. 1<sup>st</sup> DCA 2019) ("because there was no actual offer made by the State, under *Alcorn*, Appellant cannot show he was prejudiced"); *Depriest v. State*, 177 So. 3d 701, 701 (Fla. 1<sup>st</sup> DCA 2015) ("appellant has not alleged that the

*Kohutka v. State*<sup>576</sup> and *Rubright v. State*<sup>577</sup> make clear that assessing and remedying prejudice can be a good deal more difficult than appears from *Alcorn*'s simple and straightforward test. Kohutka and his brother were charged with aggravated battery. Offered a five-year plea to a reduced charge, the brother accepted and Kohutka declined. On the morning of trial the prosecution offered Kohutka a ten-year mandatory minimum sentence as a habitual violent felony offender.<sup>578</sup> Kohutka's trial lawyer told the court that she was unaware that her client qualified for habitualization and thus for a much higher maximum sentence. The court records were clear, however, that a notice of enhancement had been duly filed.<sup>579</sup>

The trial court explained to Kohutka the options he faced: If he went to trial and was convicted, he was subject to a 15-year mandatory minimum sentence with a maximum exposure of up to 30 years. If he accepted the State's then-pending offer, he would receive ten years as a mandatory minimum. Kohutka proceeded to trial, was convicted, and was sentenced to 15 years with a 15-year mandatory minimum. After the direct appeal process ran its course, he sought post-conviction relief.<sup>580</sup>

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trial court would have accepted the 15-year plea, or that the State would not have withdrawn the offer"); *Carey v. State*, 190 So. 3d 122 (Fla. 4th DCA 2015); *Hogan v. State*, 173 So. 3d 903 (Fla. 5th DCA 2015).

<sup>576</sup> 343 So. 3d 660 (Fla. 2d DCA 2022).

<sup>577</sup> \_\_\_\_ So. 3d \_\_\_\_ (Fla. 2d DCA Dec. 7, 2022).

<sup>578</sup> *Kohutka*, 343 So. 3d at 662.

<sup>579</sup> *Id.*

<sup>580</sup> *Id.* at 662-63.

In its analysis, the post-conviction court did not expressly address deficiency of performance, “perhaps because the deficiency of counsel’s performance” – her failure to be aware of habitualization and its consequences – “clearly appeared on the record.”<sup>581</sup> Counsel’s “failure to advise her client that he faced up to thirty years in prison, rather than fifteen, while he was weighing the State’s offer of five years, was deficient performance.”<sup>582</sup>

Regarding prejudice, the post-conviction court appeared to conclude that the careful explanation given to Kohutka before trial started – what penalty he was facing in the event of conviction, what penalty he was facing if he accepted the State’s then-pending plea offer – remedied trial counsel’s ineffective assistance. But the deficiency of performance arose at the point at which Kohutka considered, and rejected, the State’s original five-year offer. Once that offer was off the table, subsequent advice given by the court as to the consequences of less-desirable alternatives could not remedy the prejudice.

The case was remanded for re-analysis of the prejudice prong.<sup>583</sup> But assuming, as appears to be the case, that Kohutka was prejudiced, the more difficult question becomes: What now? What remedy can and should be imposed? The post-conviction court had expressed the view that “the only possible remedy would be a directive to the State to renegotiate.”<sup>584</sup> That

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<sup>581</sup> *Id.* at 663.

<sup>582</sup> *Id.* at 664.

<sup>583</sup> *Id.* at 664-65.

<sup>584</sup> *Id.* at 664.

view the appellate court rejected, stating only that the remedy “should be tailored to the injury suffered from the constitutional violation,”<sup>585</sup> *i.e.*, from the deprivation of effective assistance of counsel. The court of appeal deemed it “premature for us to prescribe the remedy that should apply here before the post-conviction court properly conducts a complete prejudice analysis. . . . That said, if . . . Kohutka is found to have suffered prejudice as a result of his trial counsel’s misadvice, the post-conviction court must devise a proper remedy as discussed in” *Lafler* and *Alcorn*.<sup>586</sup>

*Rubright v. State, supra*, was more of the same. At a time when neither he nor his lawyer realized that Rubright qualified as a prison releasee reoffender, Rubright rejected a six-year plea offer, pleaded guilty to the court, and asked that the matter be set for sentencing.<sup>587</sup> Subsequent to the entry of the plea, but before sentencing, the State filed a notice of Rubright’s habitualization status. The court then permitted Rubright to withdraw his plea. Subsequently the State offered, and Rubright accepted, a 15-year mandatory minimum sentence.<sup>588</sup>

Inevitably, Rubright filed a post-conviction motion, alleging that his trial attorney was ineffective for failing to advise him, at the time the State offered the six-year plea, that he qualified for habitualization and faced a 15-year mandatory minimum. “He further alleged that

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<sup>585</sup> *Id.* at 664 (quoting *Alcorn v. State*, 121 So. 3d 419, 428 (Fla. 2013), in turn quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)).

<sup>586</sup> *Kohutka*, 343 So. 3d at 665.

<sup>587</sup> *Rubright*, \_\_\_ So. 3d at \_\_\_.

<sup>588</sup> *Id.* at \_\_\_.

had he known that he faced a fifteen-year mandatory minimum sentence, he would have accepted the [State’s six-year] offer.”<sup>589</sup> The post-conviction court felt itself helpless to offer a meaningful remedy, “stat[ing] that it could not order the State to again extend the offer” of six years, “because the State, not [a] trial court, has sole discretion to pursue” a prison releasee reoffender sentence.<sup>590</sup>

As in *Kohutka*, the *Rubright* court remanded for reconsideration of the issues of prejudice and remedy. In a concurring opinion, however, Judge Lucas seemed to acknowledge that post-conviction courts were being told what to do without being told how to do it. “The vagaries of what exactly a post-conviction court is supposed to *do* in these kinds of cases – how it should exercise its discretion to redress what is deemed a constitutional deprivation of a favorable plea offer – remain much the same as they were.”<sup>591</sup>

So I sympathize with the post-conviction court and the lawyers in this case who, on remand, must now navigate a course through an area of law appellate courts seem incapable of mapping out. It’s not at all clear how judges are supposed to balance the limits of their lawful authority, the mandates of sentencing statutes, the inherent “give-and-take” nature of plea bargaining, and the constitutional directives of *Lafler* [*v. Cooper*, 566 U.S. 156 (2012)].<sup>592</sup>

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<sup>589</sup> *Id.* at \_\_\_\_.

<sup>590</sup> *Id.* at \_\_\_\_.

<sup>591</sup> *Id.* at \_\_\_\_ (Lucas, J., concurring) (emphasis in original).

<sup>592</sup> *Id.*

One of the salutary goals of the detailed change-of-plea colloquy called for by Fla. R. Crim. P. 3.172 is the avoidance of spurious post-conviction claims. It does not follow, however, that the defendant who acknowledges that he has discussed the plea with his attorney; that his attorney has answered all his questions; that he is satisfied with his attorney's representation; and that he believes his attorney to have rendered effective assistance of counsel to him; has necessarily waived post-conviction claims of ineffective assistance. In *Coursey v. State*<sup>593</sup> the post-conviction movant claimed that his trial counsel was ineffective in failing to move to suppress his confession.<sup>594</sup> The post-conviction court summarily denied the motion on the grounds that, during the change-of-plea colloquy, "Mr. Coursey indicated that he was able to discuss the entire case with his attorney and that he was satisfied with the attorney's performance. ... [T]he trial court [had] explained the constitutional rights Mr. Coursey was waiving by entering a plea and he indicated that he understood."<sup>595</sup> That being the case, the post-conviction court denigrated Coursey's claim as "merely an attempt to go behind the plea and raise issues that were knowingly and voluntarily waived by the plea agreement."<sup>596</sup> The appellate court reversed, citing its earlier opinion in *Campbell v. State*<sup>597</sup> for the proposition that an "allegation that trial counsel provided ineffective assistance by failing to file a motion to

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<sup>593</sup> 164 So. 3d 119 (Fla. 2d DCA 2015).

<sup>594</sup> *Coursey*, 164 So. 3d at 119.

<sup>595</sup> *Id.* at 119-20.

<sup>596</sup> *Id.* at 120.

<sup>597</sup> 139 So. 3d 490 (Fla. 2d DCA 2014).

suppress is a legally sufficient claim, which is not waived by entry of a plea.”<sup>598</sup> Clearly this was the correct ruling. The question, as always, is whether the trial attorney actually met the objective standard of professional representation required by competent counsel; not whether, at the time of the change-of-plea colloquy, it was the defendant’s subjective belief that his attorney did so. Certainly the defendant’s acknowledgment that his lawyer spoke to him at length, answered his questions, kept him informed as to the progress of his litigation, is evidence of effective assistance. But it is no more than evidence; and when all is said and done an unlettered defendant, unfamiliar with the intricacies of the law’s processes, may be at best a poor witness as to the quality of his lawyer’s representation.<sup>599</sup>

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<sup>598</sup> *Coursey*, 164 So. 3d at 120 (quoting *Campbell* at 497, in turn quoting *Spencer v. State*, 889 So. 2d 868, 870 (Fla. 2d DCA 2004)). See also *Arvelo v. Secretary, Florida Dep’t of Corrections*, 788 F.3d 1345 (11th Cir. 2015); *Cendejas v. State*, 250 So. 3d 851 (Fla. 2d DCA 2018); *Graham v. State*, 244 So. 3d 415 (Fla. 4<sup>th</sup> DCA 2018); *Byron v. State*, 241 So. 3d 271 (Fla. 5<sup>th</sup> DCA 2018); *Sanchez v. State*, 210 So. 3d 252 (Fla. 2d DCA 2017).

<sup>599</sup> There is a line of cases principally from the First District denigrating post-conviction claims of this kind as attempts to “go behind the plea” or to “go behind the record.” See, e.g., *Thompson v. State*, 273 So. 3d 1069, 1076 (Fla. 1<sup>st</sup> DCA 2019) (citing *Davis v. State*, 938 So. 2d 555, 557 (Fla. 1<sup>st</sup> DCA 2006)). Apparently Thompson went to trial, and during the presentation of the defense case the court asked Thompson if he agreed with his attorney’s decision not to call an “independent medical expert” as a defense witness. Apparently Thompson agreed – an agreement based, presumably, on what advice his attorney gave him and not upon any independent knowledge, trial experience, or legal scholarship of his own. But the question raised by his post-conviction motion was whether Thompson’s lawyer *actually* rendered effective assistance at trial, not whether Thompson, in his ignorance, *believed* him to have rendered effective assistance at trial. See also *Manning v. State*, 305 So. 3d 355 (Fla. 1<sup>st</sup> DCA 2020); *Thomas v. State*, 284 So. 3d 1167 (Fla. 1<sup>st</sup> DCA 2019); *Burkhalter v. State*, 279 So. 3d 314 (Fla. 1<sup>st</sup> DCA 2019). Cf., e.g., *Payne v. State*, 275 So. 3d 701 (Fla. 5<sup>th</sup> DCA 2019); *McBee v. State*, 273 So. 3d 276 (Fla. 1<sup>st</sup> DCA 2019). See also *supra* at V. B. 2.

*Rodriguez v. State*<sup>600</sup> is not *contra*. Rodriguez entered a negotiated plea of guilty pursuant to which a sentencing hearing would be conducted and the trial court would impose sentence within a stipulated range.<sup>601</sup> At the conclusion of the hearing the court imposed sentence at the top of that range.<sup>602</sup> Rodriguez then sought post-conviction relief, claiming that his lawyers had promised him a specific, much lower, sentence; that he entered his plea only because he was persuaded that his lawyers were unprepared for trial; and that his lawyers were ineffective in failing to present complete mitigation at the sentencing hearing.<sup>603</sup>

The court of appeal affirmed the denial of post-conviction relief. At the time he entered his plea, Rodriguez underwent the customary change-of-plea colloquy called for by Rule 3.172 and gave the customary answers. Canvassing the case law, the appellate court concluded emphatically that “a defendant is bound by the statements he makes under oath during a plea colloquy.”<sup>604</sup> Because Rodriguez had “swor[n] under oath that no one had made any promises to him [regarding sentencing outcomes, and that] no one had told him what sentence the trial court would impose,”<sup>605</sup> it followed that he could not assert, as the basis for his post-conviction claim,

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<sup>600</sup> 223 So. 3d 1095 (Fla. 3d DCA 2017). *See also Molina v. State*, 233 So.3d 1164 (Fla. 3d DCA 2017).

<sup>601</sup> *Rodriguez*, 223 So. 3d at 1096.

<sup>602</sup> *Id.* at 1096.

<sup>603</sup> *Id.* at 1096.

<sup>604</sup> *Id.* at 1092 (collecting cases).

<sup>605</sup> *Id.* at 1097.

that his lawyers had promised him a sentence other than the one the court actually imposed. Because Rodriguez had sworn “that there were no other witnesses, documents, or evidence [that] he wanted his counsel to investigate on his behalf,”<sup>606</sup> it followed that he could not assert, as the basis for his post-conviction claim, that his lawyers rendered ineffective assistance by presenting inadequate evidence of mitigation.

Of course the premise upon which *Rodriguez* is based – that the sworn statements made by a defendant as part of his change-of-plea colloquy are binding against him in the same manner and to the same degree as any other specimen of sworn testimony – is irrefragable. If a defendant, in the course of a change-of-plea colloquy, answers “no” to the questions, “Has anyone threatened, forced, or coerced you to accept this plea?” and “Has anyone made any promises to you, other than what has been stated here in open court on the record, to induce you to accept this plea?” a post-conviction court would, in all but the most extraordinary of circumstances, conclude without inquiry that these facts – the fact that the plea was uncoerced, and the fact that it was entered into for no consideration other than that stated by the parties in open court – have been conclusively established. But that is precisely because these *are* questions of fact. As to such questions of fact, the defendant is the best possible witness; and having given sworn testimony as to such facts, he cannot complain if those facts are not revisited. As to his first post-conviction claim – that his lawyers had promised him a specific sentence much lower than the one he got – Rodriguez’s sworn answer during the plea colloquy that no

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<sup>606</sup> *Id.* at 1097.

promises regarding sentencing were made to him was a sufficient basis for denial.

Rodriguez's second claim – that he took the plea solely because he believed his lawyers to be unprepared for trial – stands on almost equally wobbly footing. No doubt the trial court asked, in the course of accepting the plea, whether Rodriguez had discussed it with his lawyers; whether they had answered his questions; whether he was satisfied with their advice and representation; and whether he believed they had rendered effective assistance of counsel to him. The first two of the foregoing questions involve simple issues of fact: Rodriguez either discussed the plea with his lawyers or he didn't. They either answered his questions or they didn't. If Rodriguez had additional questions for his lawyers, or needed to discuss the case further with them, he was obliged to tell the trial court so.

The latter two questions, however – whether Rodriguez was satisfied with his lawyers' services, and whether he believed they had rendered effective assistance of counsel to him – deal not with matters of fact but matters of opinion. Here the preclusive force of Rodriguez's answers given during the plea colloquy is much less – indeed such answers have scarcely any preclusive effect at all. Whether Rodriguez's lawyers actually rendered deficient assistance, and if so whether that deficient assistance actually prejudiced him, are mixed questions of law and fact that can be resolved only by the post-conviction court; and in resolving them, the court is not bound in any way by the opinions offered by a defendant, unlearned in the law, in the course of a change-of-plea colloquy. That those opinions were rendered under oath does not alter their status

as mere opinions.<sup>607</sup>

Rodriguez’s third post-conviction claim was that his lawyers presented inadequate mitigation at his sentencing hearing. That Rodriguez himself knew of no witnesses or exhibits that his lawyers might have produced at sentencing but did not does not preclude a finding that the lawyers violated the deficiency prong of the *Strickland* test. Such witnesses or exhibits may have existed, unknown to Rodriguez; and his lawyers may have made inadequate efforts to obtain them. But the post-conviction court could properly conclude that, given Rodriguez’s inability to identify anything left undone that could have been done to benefit him at sentencing, there could be no satisfaction of *Strickland*’s prejudice prong.

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<sup>607</sup> The post-conviction claimant in *Sosataquechel v. State*, 246 So. 3d 497 (Fla. 3d DCA 2018), alleged, *inter alia*, that his trial counsel failed to advise him that he could have asserted self-defense. *Sosataquechel*, 246 So. 3d at 499. “Sosataquechel’s affirmative answer to the court’s plea colloquy question about whether he had an adequate opportunity to discuss the facts of the case and defenses thereto [with his lawyer] does not adequately resolve” this claim. *Id.* at 499 (citing *Wright v. State*, 675 So. 2d 1009 (Fla. 2d DCA 1996)). *But cf. Sosataquechel* at 500 (Luck, J., dissenting): “Sosataquechel’s answers at the plea colloquy conclusively refute his claim that his attorney did not discuss the facts of the case with him and never advised him about defenses to the murder charge. He swore at the time of his plea that his attorney did do these things.” Thus the majority concludes, quite correctly, that a defendant’s sworn statement during a change-of-plea colloquy that he had “had an adequate opportunity to discuss the” case with his trial lawyer does not necessarily preclude a post-conviction claim. The defendant may have sincerely believed, at the time he took the plea, that the discussion he had with his trial attorney was “adequate;” and may have equally sincerely believed, at the time he filed his post-conviction claim, that upon further reflection he considered that discussion less than adequate. But the dissent concludes, equally correctly, that the defendant’s sworn statement that his attorney did advise him of all available defenses to the crimes charged, including the defense of self-defense, is a matter not of opinion but of fact as to which the defendant is bound. *See also Rodriguez-Lopez v. State*, 268 So. 3d 827, 827-29 (Fla. 1<sup>st</sup> DCA 2019) (Winokur, J., concurring).

The post-conviction claimant in *Harris v. State*<sup>608</sup> alleged that his trial attorney advised him “that he would likely have his adjudication withheld if he entered a guilty plea, that a withhold was very important to him because he did not want to become a convicted felon and lose his civil rights, and that this advice was the reason he entered the plea.”<sup>609</sup> This advice was erroneous; Harris had a prior felony withhold and was therefore not eligible for another.<sup>610</sup> The post-conviction court, however, concluded that there was no prejudice as a consequence of trial counsel’s misadvice. Harris had been “advised by the [trial] court at the [change of] plea colloquy that he could be sentenced to 15 years in prison and . . . the prior withhold was not a factor that the trial court considered in imposing sentence.”<sup>611</sup>

The appellate court quite properly pointed out, however, that the question before the post-conviction court was not whether misadvice of counsel was a factor in the trial court’s sentencing decision, but whether, but for the misadvice, Harris would have declined to plead guilty and would have insisted on going to trial.<sup>612</sup> “Harris’s claim may be distinguished from one where counsel’s alleged misadvice was contradicted by the trial judge at the plea colloquy, and the

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<sup>608</sup> 295 So. 3d 855 (Fla. 1<sup>st</sup> DCA 2020).

<sup>609</sup> *Harris*, 295 So. 3d at 856.

<sup>610</sup> *Id.* at 856 (citing Fla. Stat. § 775.08435(1)(b)).

<sup>611</sup> *Harris*, 295 So. 3d at 856.

<sup>612</sup> *Id.*

defendant swore he understood the trial judge's advice."<sup>613</sup> As to such a claim, the misadvice would still constitute deficient performance; but a post-conviction judge could conceivably find that the change-of-plea colloquy had the effect of removing any prejudice.<sup>614</sup>

Claims of ineffective assistance in connection with a plea, and of involuntariness of a plea, are often alleged to turn upon whether undisclosed consequences of the plea are "direct" or merely "collateral."<sup>615</sup> Justice John Paul Stevens has written, "There is some disagreement among the courts over how to distinguish between direct and collateral consequences."<sup>616</sup> Indeed there is. Such disagreement aside, as of this writing the definition of choice in Florida "turns on whether the result represents a *definite, immediate and largely automatic* effect on the range of the defendant's punishment."<sup>617</sup> Whether the use of the italicized synonyms for "direct" (and antonyms for "collateral") makes the distinction conceptually clearer is a nice question. Undoubtedly a consequence that is direct (or definite, or immediate, or largely automatic) is one that is not collateral, and one that is collateral is one that is not direct (or definite, or immediate,

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<sup>613</sup> *Id.* (citing *Alfred v. State*, 998 So. 2d 1197, 1199 (Fla. 4<sup>th</sup> DCA 2009); *Bowers v. State*, 862 So. 2d 772, 773 (Fla. 4<sup>th</sup> DCA 2003)).

<sup>614</sup> *See Malone v. State*, 312 So. 3d 199 (Fla. 1<sup>st</sup> DCA 2021).

<sup>615</sup> *See, e.g., Ortiz v. State*, 227 So. 3d 682 (Fla. 3d DCA 2017).

<sup>616</sup> *Padilla v. Kentucky*, 559 U.S. 356, 364 n. 8 (2010).

<sup>617</sup> *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.) *cert. denied*, 414 U.S. 1005 (1973) (emphasis added) (cited with approval in *Major v. State*, 814 So. 2d 424, 429 (Fla. 2002); *Colon v. State*, 199 So. 3d 960, 962 (Fla. 4th DCA 2016); *Daniels v. State*, 716 So. 2d 827, 828 (Fla. 4th DCA 1998); *Zambuto v. State*, 413 So. 2d 461, 462 (Fla. 4th DCA 1982)).

or largely automatic). This tautology will serve to resolve few if any cases. An alternative formulation provides that collateral consequences are those that do not inhere in the order of judgment and sentence. But this is simply another broad and general statement. Florida courts have struggled to apply these general statements to concrete cases.

In *State v. Harris*,<sup>618</sup> for example, the Supreme Court of Florida concluded that civil commitment as a consequence of conviction of certain sex crimes is not a “direct” consequence – and then promptly ordered that the change-of-plea colloquy appearing in Fla. R. Crim. P. 3.172 be modified to include an advisement to defendants of this consequence.<sup>619</sup> In *Bolware v. State*,<sup>620</sup> the Supreme Court concluded that the loss of a driver’s license as a consequence of conviction for certain drug- and drinking-related crimes is not a “direct” consequence – and then promptly ordered that the change-of-plea colloquy be modified to include an advisement to defendants of this consequence.<sup>621</sup> Long before *Padilla v. Kentucky*,<sup>622</sup> the Florida Supreme Court had concluded that deportation as a result of criminal conviction is not a “direct” consequence, *see*

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<sup>618</sup> 881 So. 2d 1079 (Fla. 2004).

<sup>619</sup> *Harris*, 881 at 1085 n. 5; *In Re Amendments to Fla. R. Crim. P. 3.172*, 911 So. 2d 763 (Fla. 2005). Regarding sexual-registration requirements as a consequence of a plea of guilty (and therefore as a basis for a post-conviction claim), *see, e.g., Vega v. State*, 208 So. 3d 215 (Fla. 3d DCA 2016); *Faiella v. State*, 203 So. 3d 199 (Fla. 5<sup>th</sup> DCA 2016); *Peng v. State*, 202 So. 3d 459 (Fla. 5<sup>th</sup> DCA 2016).

<sup>620</sup> 995 So. 2d 268 (Fla. 2008).

<sup>621</sup> *Bolware*, 995 So. 2d at 276, 285 n. 5.

<sup>622</sup> 559 U.S. 356 (2010).

*State v. Ginebra*,<sup>623</sup> – and then promptly ordered that the change-of-plea colloquy be modified to include an advisement to defendants of this consequence.<sup>624</sup>

In ordering these changes to Rule 3.172, our state Supreme Court put aside the largely artificial, and not particularly helpful, distinction between direct and collateral consequences and focused instead on whether a given consequence would be material to a reasonable defendant called upon to decide whether to take the offered plea or to take his chances at trial. As discussed in greater detail *infra*, the acceptance of a plea must be voluntary; to be voluntary, it must be informed and knowing; and to be informed and knowing, it must be the product of consideration of those facts, those consequences, those considerations that a defendant would reasonably take into account in making so momentous a decision – whether those facts, those consequences, those considerations be denominated “direct,” “collateral,” or something else. A reasonable defendant would weigh and consider, in deciding to accept or reject a plea, the prospect that the plea would result in his confinement – “civil” confinement, but confinement nonetheless – for years, perhaps for the rest of his life, if he accepts it. So Rule 3.172(c)(9) was added to the plea colloquy. A reasonable defendant would weigh and consider, in deciding to accept or reject a plea, the prospect that he may lose his driver’s license – and the attendant ability to commute to work, to transport children to school, and so on – if he accepts it. So Rule

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<sup>623</sup> 511 So. 2d 960 (Fla. 1987). *See also United States v. Parrino*, 212 F. 2d 919 (2d Cir. 1954).

<sup>624</sup> *In Re Amendments to Florida Rules of Criminal Procedure*, 536 So. 2d 992, 992 (Fla. 1988).

3.172(c)(10) was added to the plea colloquy. A reasonable defendant would weigh and consider, in deciding whether to accept or reject a plea, the prospect that he may be deported to a far-off land, never to return, if he accepts it. So Rule 3.172(c)(8) was added to the plea colloquy. Although the Florida Supreme Court has never formally abandoned the direct-versus-collateral language, it has repeatedly expressed its support for the notion that a defendant about to enter a guilty plea should be told, not merely about those consequences that may be considered “direct,” but about those consequences that, in his particular circumstances, may be reasonably considered material to his decision.<sup>625</sup>

Some Florida justices have gone further, urging that the unhelpful direct-versus-collateral distinction be abandoned altogether. Prior to the addition of subsection (c)(9) to the Rule 3.172

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<sup>625</sup> It can scarcely be doubted that Rule 3.172 will, in future years, be expanded to advise defendants of consequences that may be classified today as “collateral.” As Justice Alito has observed:

[C]riminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.

*Padilla*, 559 U.S. at 376 (Alito, J., concurring). Pursuant to the peculiar iteration of the collateral estoppel principle codified at Fla. Stat. § 772.14, if the crime to which a defendant pleads guilty is a property crime, the victim of that crime can file suit against him in civil court, move for summary judgment as to liability, and the defendant will be estopped to defend. More peculiar still are the provisions of Fla. Stat. § 775.13, pursuant to which a Floridian with a felony conviction in one county who visits another Florida county for more than 48 hours must register with the local sheriff; his failure to do so constitutes a separate misdemeanor. These consequences, whether deemed “direct” or “collateral,” are undoubtedly very serious. Yet they form no part of the Rule 3.172 change-of-plea colloquy – at least not yet.

colloquy, Justice Cantero wrote:

[T]he sexual offender registration requirement is an important enough consequence, even if collateral, to justify informing a defendant of its existence. A defendant's constitutional right to a jury trial is sacrosanct. ... The rules should require that before a defendant waives that important right, the defendant be informed of all important consequences, *whether direct or collateral*.<sup>626</sup>

Some federal cases, while clinging to the “direct versus collateral” nomenclature, also look to the materiality of a given consequence rather than its “directness” in determining whether its omission from a change-of-plea colloquy renders the ensuing plea involuntary. For example, “when a [federal] defendant pleads guilty to an offense under which he is not eligible for parole, he should be made aware of that fact before the acceptance of his plea.”<sup>627</sup> “The reason for this conclusion is that the right to parole has become so engrafted on the criminal sentence that such right is ‘assumed by the average defendant’ and is directly related in the defendant’s mind with the length of his sentence.”<sup>628</sup> As the law stood in the early 1970’s, a reasonable federal

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<sup>626</sup> *State v. Partlow*, 840 So. 2d 1040, 1045 (Fla. 2003) (Cantero, J., concurring) (emphasis added). *See also Ashley v. State*, 614 So. 2d 486, 488 (Fla. 1993) (Shaw, J.) (“this Court has ruled that in order for a plea to be knowing and intelligent the defendant must understand the reasonable consequences” – not merely the direct, but all the reasonable, consequences – “of the plea”); *Major v. State*, 814 So. 2d 424, 432 (Fla. 2002) (Pariente, J., concurring).

<sup>627</sup> *Cuthrell*, 475 F.2d at 1366 (citing *Paige v. United States*, 443 F.2d 781, 178-83 (4th Cir. 1971)); *but cf. Hampton v. State*, 217 So.3d 1096 (Fla. 5<sup>th</sup> DCA 2017) (gain time, good time, provisional credit time, and additional mitigating credits are all collateral consequences)

<sup>628</sup> *Cuthrell*, 475 F.2d at 1366 (citing *Moody v. United States*, 469 F.2d 705, 708 (8th Cir. 1972)).

defendant would weigh and consider his prospects for parole in deciding whether to accept a plea. Such consideration would be material to his decision. As such, it was something about which he would have to be informed in order to make that knowing, intelligent, waiver of trial rights without which a plea of guilty is unconstitutional because involuntary.

The “direct versus collateral” distinction long antedates the modern, detailed change-of-plea colloquies that both the state and federal constitutions are now understood to require, as well as the advent of the ever-increasing list of ever-more-important collateral consequences.<sup>629</sup> It is presently the law that, “Due process requires a court accepting a guilty plea to carefully inquire into the defendant’s understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.”<sup>630</sup> But Rule 3.172 of the Florida Rules of Criminal Procedure, setting forth with specificity the manner in which a trial judge must catechize a defendant who wishes to plead guilty or no contest, was spun off from Rule 3.170 in 1970. Rule 3.170, in turn, dates back only as far as 1968. *Boykin v. Alabama*,<sup>631</sup> coeval with these rules, provides their constitutional underpinning. By contrast, decades before these constitutionally-compelled, rule-based catechisms were invented or required, courts had coined the “direct versus collateral” standard.<sup>632</sup> At the time that standard was invented and first employed, a careful

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<sup>629</sup> As to the latter, *see supra* n. 625.

<sup>630</sup> *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992).

<sup>631</sup> 395 U.S. 238 (1969).

<sup>632</sup> *See, e.g., United States v. Parrino*, 212 F.2d 919 (2nd Cir. 1954).

sifting of a criminal defendant as to his understanding of the full consequences of his plea was not compelled as a matter of constitutional law. Now it is.

Fla. R. Crim. P. 3.850(a)(5) provides for post-conviction relief from a plea not voluntarily entered. For a plea to be voluntarily entered, it must be informed, knowing, intelligent. “A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, ‘with sufficient awareness of the relevant circumstances and likely consequences’.”<sup>633</sup> This contemplates a defendant who has been given materially correct and relevant advice by his lawyer; who has been sifted thoroughly by the trial court’s plea colloquy; and who is possessed of sufficient intellectual and psychological wherewithal to appreciate both his lawyer’s advice and the trial court’s inquiries.

There is an important conceptual distinction between a post-conviction claim that alleges ineffective assistance of counsel and a post-conviction claim that alleges the involuntariness of a plea.<sup>634</sup> The former claim is analyzed according to the straightforward formula of *Strickland v. Washington*: the court considers first, whether trial counsel’s performance was deficient; and second, whether the deficiency prejudiced the defendant. Analysis of the latter claim, however,

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<sup>633</sup> *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

<sup>634</sup> A post-conviction motion claiming involuntariness of the underlying plea must include a request to withdraw the plea. *See, e.g., Costello v. State*, 330 So. 3d 1052 (Fla. 2d DCA 2021).

is not so straightforward.<sup>635</sup> A plea may be rendered involuntary by defense counsel’s misadvice, or failure to advise. It may be rendered involuntary by the court’s inadequate or misleading plea colloquy. It may be rendered involuntary by the defendant’s intellectual or psychological shortcomings. The ineffective assistance of counsel claim looks solely at what the trial lawyer did or did not do. The involuntariness claim looks in many directions. As noted *supra*, the post-conviction claimant who categorizes his trial counsel’s misadvice as ineffective assistance imposes upon himself the pleading and proof requirements of *Strickland v. Washington*; the claimant who categorizes his trial counsel’s misadvice as having rendered his own plea of guilty involuntary may not. But the post-conviction claim of ineffective assistance likely cannot be rebutted by evidence that a sufficient change-of-plea colloquy was conducted; a claim of involuntariness may be.<sup>636</sup>

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<sup>635</sup> It is, fortunately, a rarity for a defendant to allege that his plea was involuntary because it was the product of attorney-inflicted duress, *viz.*, that the attorney actually coerced the defendant into taking the plea. It is a rarity, but it does happen. Such a claim, “may be conclusively refuted by the defendant’s responses during plea colloquy.” *Rivero v. State*, 121 So.3d 1175, 1178 (Fla. 3d DCA 2013) (citing, *inter alia*, *Alfred v. State*, 71 So. 3d 138, 139 (Fla. 4<sup>th</sup> DCA 2011) (“A defendant is bound by his sworn answers during a plea colloquy and cannot later disavow those answers by asserting that he lied during the colloquy at counsel’s direction”)).

<sup>636</sup> The petitioner in *Todd v. Roberson*, 827 F.3d 693 (7<sup>th</sup> Cir. 2016) (Posner, J.), claimed in his post-conviction motion that his trial attorney “had been ineffective because he’d induced him to plead guilty by telling him the government would recommend no more than a 10-year sentence.” *Todd*, 827 F.3d at 694. In the view of the court of appeals, however, the trial court’s searching change-of-plea colloquy, and Todd’s answers to the court’s questions, undid his claim.

Even if we assume that [Todd] believed in the 10-year cap, he either lied or was confused in replying “no” when asked by the judge whether any promises had been made to him ... . If he lied, he has no right to change his story and get a trial. If he was

Two contrasting opinions illustrate these distinctions – although they fall back upon the “direct versus collateral” model to do so. The defendant in *Gusow v. State*<sup>637</sup> was charged in no fewer than 47 felony counts. His lawyer worked out a plea agreement – seemingly a very favorable plea agreement – resulting in his being sentenced to probation.<sup>638</sup> Some years later, however, Gusow violated his probation and was sentenced to 17 years in prison.<sup>639</sup> He then moved to vacate his earlier plea agreement pursuant to Rule 3.850(a)(5), arguing that the plea was rendered involuntary “because his [trial] counsel misadvised him that he would face a maximum of only five years in prison for violation of probation.”<sup>640</sup>

Gusow’s argument was not well taken. Although both the trial court and trial counsel have an obligation to inform a defendant about the direct consequences of his plea, there is no such obligation with respect to collateral consequences. “The failure to advise about a collateral consequence could not be the basis for post-conviction relief to set aside the plea bargain.”<sup>641</sup>

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confused and still believed there was a sentencing cap, the trial judge disabused him of his mistake by telling him he could be sentenced to anywhere from 6 to 60 years even if he pleaded guilty – which is what he did, with his eyes open.

*Id.* at 696.

<sup>637</sup> 6 So. 3d 699 (Fla. 4th DCA 2009) (Gross, C. J.).

<sup>638</sup> *Gusow*, 6 So. 3d at 700.

<sup>639</sup> *Id.*

<sup>640</sup> *Id.*

<sup>641</sup> *Id.* at 701.

And certainly the consequence here was collateral: it was Gusow’s intervening voluntary act of probation violation, and not some automatic legal consequence, that resulted in the 17-year sentence.<sup>642</sup>

Compare *Polite v. State*.<sup>643</sup> Like Gusow, Polite entered into a plea agreement.<sup>644</sup> Unlike Gusow, Polite did not then commit an independent act, such as a violation of probation, that would trigger legal consequences; he simply moved for post-conviction relief on the grounds that “his attorney misadvised him as to the maximum sentence he could receive upon revocation of the community control/probation” to which he had been sentenced.<sup>645</sup> “Polite stated he would have rejected the plea and gone to trial had he known the possible repercussions of a violation.”<sup>646</sup> The Third District held that Polite was entitled to relief on his post-conviction claim, on the grounds that, “The maximum penalty that could be imposed if community control/probation is violated is a direct consequences of the plea.”<sup>647</sup> Misadvice by trial counsel, or non-advice by the trial court, as to this material direct consequence rendered the plea less than voluntary because less than fully informed.

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<sup>642</sup> *Id.* at 701-02. See also *State v. Fox*, 659 So. 2d 1324 (Fla. 3d DCA 1995).

<sup>643</sup> 990 So. 2d 1242 (Fla. 3d DCA 2008).

<sup>644</sup> *Polite*, 990 So. 2d at 1243.

<sup>645</sup> *Id.*

<sup>646</sup> *Id.* Apparently Polite’s trial attorney advised him that in the event of a violation of community control or probation, he faced no more than a six-year prison sentence. In fact, Polite faced the maximum for the various offenses to which he pleaded guilty. *Id.* at 1244.

<sup>647</sup> *Id.* at 1244.

Thus in *Gusow*, in which the defendant actually violated his probation, his attorney's prior misadvice as to the consequences of such a violation was merely collateral; and because it was collateral, Gusow was entitled to no post-conviction relief. In *Polite*, in which the defendant had yet to violate his probation, his attorney's prior misadvice as to the consequences of any future violation was direct; and because it was direct, it rendered the plea involuntary and entitled Polite to post-conviction relief. Perhaps the seeming contradiction between the two opinions, the internal logic of each of which is unimpeachable, can be attributed to the difference between the nature of the two claims. Gusow alleged (or at least his post-conviction motion was treated as alleging) ineffective assistance of trial counsel, Fla. R. Crim. P. 3.850(a)(1). Such a claim requires a showing of both deficient performance and resulting prejudice. In Gusow's case any prejudice was attributable to the intervening volitional act of the post-conviction movant, and therefore not attributable to his trial counsel. Polite alleged (or at least his post-conviction motion was treated as alleging) involuntariness of his plea, Fla. R. Crim. P. 3.850(a)(5). Such a claim requires a showing that the defendant was materially misinformed or uninformed, such that he was not in a position to make a knowing and intelligent, and thus voluntary, choice among available litigation options. In Polite's case there was nothing in the record to rebut his averment that he was materially misinformed or uninformed; his claim was therefore properly granted.

As discussed *supra*, the colloquy provided for by Rule 3.172 does not identify every material consequence that may befall a defendant as a result of his plea of guilty. A well-intentioned and fair-minded judge may be moved to add to the prescribed plea colloquy, alerting

a given defendant to additional post-plea consequences that the judge thinks in fairness the defendant should know about. Although no real harm is done as a result of such a practice, the judge, in his effort to be fair, may be perceived as professionally unethical. The Florida Code of Judicial Conduct provides at Canon Two that a judge must “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The Commentary adds that, “The test for appearance of impropriety is whether the conduct would create in reasonable minds . . . a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.” Query whether a judge who, in the pursuit of fairness to the defendant, advises the defendant of plea consequences additional to those appearing in Rule 3.172, might be perceived as being less than entirely impartial.

## 2. Claims relating to deportation consequences<sup>648</sup>

Fla. R. Crim. P. 3.172( c)(8) provides that, as part of the change-of-plea colloquy, the court must establish that the defendant understands that if he is not a U.S. citizen, his plea of guilty or no contest “may” subject him to deportation.<sup>649</sup> The use of the word “may” serves no one well. In truth there are almost no Florida felonies to which a defendant can plead guilty that

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<sup>648</sup> Regarding a claim of deportation consequences as newly-discovered evidence, *see* discussion *supra* at II D 1.

<sup>649</sup> “If the defendant is not a citizen of the United States, a finding of guilt by the court, and the court’s acceptance of the defendant’s plea of guilty or no contest, regardless of whether adjudication of guilt has been withheld, *may* have the additional consequence of changing his or her immigration status, including deportation or removal from the United States.” Fla. R. Crim. P. 3.172( c)(8)(A) (emphasis added). *See Pluck v. State*, 251 So. 3d 1042 (Fla. 5<sup>th</sup> DCA 2018).

will not result in some action by Immigration and Customs Enforcement. The likelihood of deportation consequences is so great that it all but misleads a criminal defendant to tell him only that his plea “may” subject him to removal. But because the standard change-of-plea colloquy does speak in terms of “may,” defendants from time to time seek to attack their convictions collaterally when the mere prospect of deportation proceedings is succeeded by the fact of deportation proceedings.

To state a claim of ineffective assistance of counsel in this context, the defendant must establish:

(1) that the movant was present in the country lawfully at the time of the plea; (2) that the plea at issue is the sole basis for the movant’s deportation; (3) that the law, as it existed at the time of the plea, subjected the movant to “virtually automatic” deportation; (4) that the “presumptively mandatory” consequence of deportation is clear from the face of the immigration statute; (5) that counsel failed to accurately advise the movant about the deportation consequences of the plea; and (6) that, if the movant had been accurately advised, he or she would not have entered the plea.<sup>650</sup>

Failure of trial counsel to advise effectively with respect to deportation issues is not remedied by the inquiry that the trial court conducts pursuant to Rule 3.172( c)(8).<sup>651</sup> As Judge

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<sup>650</sup> *Cano v. State*, 112 So. 3d 646, 648 (Fla. 4th DCA 2013). *See also Nunez v. State*, 331 So. 3d 229 (Fla. 2d DCA 2021); *Yanez v. State*, 170 So. 3d 9, 10 (Fla. 2d DCA 2015) (“We agree with *Cano* ... and conclude that because Ms. Yanez was in this country unlawfully, she cannot show that she was prejudiced by counsel’s misadvice as she was already subject to deportation before she entered the plea”). *See gen’ly State v. Sinclair*, 995 So. 2d 621 (Fla. 3d DCA 2008).

<sup>651</sup> *See, e.g., United States v. Batamula*, 823 F.3d 237, 243 (5<sup>th</sup> Cir. 2016) (Dennis, J., dissenting on other grounds).

Gerber explained in the course of a very thorough and scholarly opinion:

The circuit court’s error in this regard ... stems from the court’s finding that a defendant’s ineffective assistance of *counsel* claim in this context can be refuted by the *court’s* colloquy with the defendant. That finding is incorrect. The only way in which the record can refute an ineffective assistance of *counsel* claim for failure to inform the defendant whether the plea carried a risk of deportation is for the record to show that *counsel* informed the defendant whether the plea carried a risk of deportation.<sup>652</sup>

...

What the court could have found, *in theory*, is that counsel’s performance, on the face of the record only, was deficient, but the court’s warning during the plea colloquy, that the plea “probably” would result in the defendant’s deportation, *removed any prejudice* caused by counsel’s alleged ineffective assistance.<sup>653</sup>

The process by which the presence or absence of prejudice is determined is a difficult one, requiring as it does an analysis by the post-conviction court of the immigration laws. If a defendant’s plea has merely *possible* immigration consequences – if, in the language of *Padilla v. Kentucky*,<sup>654</sup> it was not “truly clear” that deportation proceedings would follow – then the admonishment of Rule 3.172( c)(8) that the plea “may” result in deportation consequences can be

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<sup>652</sup> *Cooke v. State*, 174 So. 3d 628, 634-35 (Fla. 4<sup>th</sup> DCA 2015) (Gerber, J.) (emphasis in original).

<sup>653</sup> *Id.* at 635 (emphasis in original). *See also Alsubaie v. State*, 268 So. 3d 1013 (Fla. 1<sup>st</sup> DCA 2019); *Goddard v. State*, 217 So.3d 1105 (Fla. 2d DCA 2017).

<sup>654</sup> 559 U.S. 356, 369 (2010)

sufficient to eliminate prejudice. If, however, a defendant’s plea has presumptively mandatory immigration consequences – if it was “truly clear” that deportation proceedings would follow – then the admonishment contained in the rule will likely be insufficient to eliminate prejudice.<sup>655</sup> This determination can be made only by examination of the relevant provisions of the Immigration and Naturalization Act – something that state-court judges, prosecutors, and defense attorneys do without enthusiasm or confidence.

#### D. Waiver of claim of ineffective assistance

The defendant in *Stahl v. State*<sup>656</sup> entered into a plea agreement, as a condition of which he expressly waived the filing of any post-conviction motions.<sup>657</sup> The waiver condition notwithstanding, he brought a post-conviction motion raising no fewer than 42 claims and asserting that “his negotiated plea agreement could not bar his right to file this motion.”<sup>658</sup>

The Second District cited *Leach v. State*<sup>659</sup> for the proposition that a defendant can enter into an enforceable waiver of his post-conviction rights.<sup>660</sup> “[A] defendant can waive his right to collaterally attack his judgment and sentence when the waiver is expressly stated in the plea

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<sup>655</sup> *Cooke* at 638. See *Ramirez v. State*, 319 So. 3d 191 (Fla. 5<sup>th</sup> DCA 2021).

<sup>656</sup> 972 So. 2d 1013 (Fla. 2d DCA 2008).

<sup>657</sup> *Stahl*, 972 So. 2d at 1015.

<sup>658</sup> *Id.*

<sup>659</sup> 914 So. 2d 519 (Fla. 4<sup>th</sup> DCA 2005).

<sup>660</sup> *Stahl*, 972 So. 2d at 1015 (citing *Leach*, 914 So. 2d at 523).

agreement and he knowingly and voluntarily agrees to the waiver.”<sup>661</sup> There is, however, one important exception: “[I]neffective assistance of counsel claims attacking the advice received from counsel in entering into the plea and waiver cannot be waived.”<sup>662</sup>

William Silvia was convicted of capital murder and sentenced to death on a jury’s 11-1 death recommendation.<sup>663</sup> At some point post-conviction proceedings were initiated, but subsequently “Silvia waived his right to [both] post-conviction proceedings and [post-conviction] counsel,” which waivers were determined by the Florida Supreme Court to be effective.<sup>664</sup>

After the decision in *Hurst v. State*,<sup>665</sup> however, Silvia filed a post-conviction motion claiming that the imposition upon him of the death penalty on the basis of a less-than-unanimous

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<sup>661</sup> *Stahl*, 972 So. 2d at 1015 (citing *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005)).

<sup>662</sup> *Stahl*, 972 So. 2d at 1015 (citing *Nixon v. United States*, No. CV206-071, 2006 WL 2850430, at \*2 (S.D.Ga. Oct. 3, 2006)). *See also United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (“[A]n ineffective assistance of counsel argument survives waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself. ... [A]n impermissible boot-strapping arises where a waiver is sought to be enforced to bar a claim that the waiver itself – or the plea agreement of which it was a part – was unknowing or involuntary”); *Pagan v. State*, 110 So. 3d 3, 5 (Fla. 2d DCA 2012); *Contreras-Garcia v. State*, 95 So. 3d 993, 995 (Fla. 2d DCA 2012); *Vargas v. State*, 63 So. 3d 47, 51 (Fla. 3d DCA 2011) (Emas, J., dissenting).

<sup>663</sup> *State v. Silvia*, 235 So. 3d 349 (Fla. 2018).

<sup>664</sup> *Silvia*, 235 So. 3d at 350.

<sup>665</sup> 202 So. 3d 40 (Fla. 2016).

jury verdict was unconstitutional.<sup>666</sup> The post-conviction court

concluded that Silvia was not “seeking to reinstate his previously waived post-conviction proceedings because he had changed his mind” but was “seeking to avail himself of a newly established constitutional right he did not possess at the time of the waiver.” The [post-conviction] court determined that Silvia “could not knowingly and voluntarily waive a right ... he did not possess at the time of the waiver” and, therefore, found that Silvia “is not precluded from seeking *Hurst* relief.”<sup>667</sup>

The Florida Supreme Court reversed, concluding that Silvia’s post-conviction waiver extended to “his right to take advantage of any changes that may occur in the law.”<sup>668</sup> He was thus precluded from claiming the benefit of the otherwise-retroactive effect of *Hurst*.

E. When can a claim of ineffective assistance be raised on direct appeal?<sup>669</sup>

It has long been an axiom of Florida post-conviction practice that, “Generally, ineffective assistance of counsel is a collateral matter which should be addressed through a motion for post-conviction relief” and not on direct appeal.<sup>670</sup> This general rule is:

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<sup>666</sup> *Silvia*, 235 So.3d at 352.

<sup>667</sup> *Id.* at 354 (ellipsis in original).

<sup>668</sup> *Id.* at 351.

<sup>669</sup> *See also discussion supra* at II. C.

<sup>670</sup> *Stewart v. State*, 420 So. 2d 862, 864 n. 4 (Fla. 1982) (citing *Knight v. State*, 394 So. 2d 997 (Fla. 1981) and *Meeks v. State*, 382 So. 2d 673 (Fla. 1980)). *See also Rivera v. State*, 193 So. 3d 1033 (Fla. 3d DCA 2016) (citing *Bruno v. State*, 807 So. 2d 55 (Fla. 2001); *Desire v. State*, 928 So. 2d 1256 (Fla. 3d DCA 2006)).

designed to assure that direct appeal issues are considered only once, and matters that require inquiry beyond the face of the record are reviewed in a forum that is equipped to conduct the additional evidentiary inquiry. For example, a defendant may raise on direct appeal the issue of whether the trial court erred when it denied a motion for new trial. Because that issue may be raised on direct appeal, it may not be raised later in a motion under Rule 3.850. Likewise, the defendant may not raise the same issue again merely by recasting it as a claim for ineffective assistance of counsel. Thus, in this hypothetical, the defendant could not argue in a postconviction motion that his lawyer was ineffective because the trial court denied the motion for new trial. In that situation, the postconviction allegation is simply adding the words, “ineffective assistance of counsel” without adding any new facts or legal arguments.

On the other hand, the fact that a defendant unsuccessfully raised the denial of his motion for new trial on direct appeal would not bar a claim that his counsel was ineffective because counsel filed an untimely motion for new trial or because counsel omitted a critical ground when drafting and arguing that motion. In such a situation, unlike the previous hypothetical, the postconviction motion is not merely repeating the issue raised on direct appeal. Instead, it is raising a separate issue that is somewhat interrelated with the issue raised on direct appeal.<sup>671</sup>

Perhaps the best statement of the test for the exception to the general rule disallowing claims of ineffective assistance on direct appeal – an exception that courts repeatedly refer to as narrow, rare, very uncommon – is that such a claim can be brought “when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable,

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<sup>671</sup> *Corzo v. State*, 806 So. 2d 642, 644-45 (Fla. 2d DCA 2002) (Altenbernd, J.).

and a tactical explanation for the conduct is inconceivable.”<sup>672</sup> In *Spicer v. State*,<sup>673</sup> for example, defense counsel, having presented evidence that his client acted in self-defense, argued repeatedly to the jury in summation that it was the defense’s burden to prove the fact of self-defense.<sup>674</sup> He then submitted to the trial court a jury instruction stating that self-defense had to be proved by the defense beyond a reasonable doubt.<sup>675</sup> The three-part test of *Corzo* was clearly met: the ineffectiveness of counsel was apparent on the face of the record, the resulting prejudice was undeniable, and there could be no tactical justification for the demised conduct.

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<sup>672</sup> *Corzo*, 806 So. 2d at 645. See gen’ly *Rodriguez-Olivera v. State*, 328 So. 3d 1080 (Fla. 2d DCA 2021); *Maksymowska v. State*, 310 So. 3d 1053 (Fla. 2d DCA 2020); *Booker v. State*, 301 So. 3d 432 (Fla. 2d DCA 2020); *Howard v. State*, 288 So. 3d 1239 (Fla. 2d DCA 2020); *White v. State*, 310 So. 3d 967 (Fla. 2d DCA 2020); *Squire v. State*, 278 So. 3d 153 (Fla. 4<sup>th</sup> DCA 2019); *Bishop v. State*, 300 So. 3d 697 (Fla. 1<sup>st</sup> DCA 2019); *Gaskins v. State*, 266 So. 3d 882 (Fla. 5<sup>th</sup> DCA 2019); *Huckaba v. State*, 260 So. 3d 377 (Fla. 1<sup>st</sup> DCA 2018); *Kruse v. State*, 222 So. 3d 13 (Fla. 4<sup>th</sup> DCA 2017); *Marty v. State*, 210 So.3d 121 (Fla. 2d DCA 2016); *Lesovsky v. State*, 198 So.3d 988 (Fla. 4<sup>th</sup> DCA 2016); *Romine v. State*, 162 So.3d 1102 (Fla. 2d DCA 2015); *Larry v. State*, 61 So. 3d 1205, 1207 (Fla. 5th DCA 2011) (citing *Corzo* with approval and collecting cases); *Eure v. State*, 764 So. 2d 798 (Fla. 2d DCA 2000); *Ross v. State*, 726 So. 2d 317, 318-19 (Fla. 2d DCA 1999); *Mizell v. State*, 716 So. 2d 829, 830 (Fla. 3d DCA 1998) (adjudicating claim of ineffective assistance on direct appeal “to avoid the legal churning which would be required if we made the parties and the lower court do the long way what we ourselves should do the short”).

The First District has suggested that a second exception exists “when defense counsel’s failure to prepare was brought about by the speed in which the case went to trial, not by trial counsel’s dilatory action.” *Loren v. State*, 601 So. 2d 271, 273 (Fla. 1st DCA 1992) (citing *Valle v. State*, 394 So. 2d 1004 (Fla. 1981)).

<sup>673</sup> 22 So. 3d 706 (Fla. 5th DCA 2009). See also *Kruse v. State*, 222 So. 3d 13 (Fla. 4<sup>th</sup> DCA 2017) (failure to request self-defense jury instruction in case in which only defense was self-defense).

<sup>674</sup> *Spicer*, 22 So. 3d at 707.

<sup>675</sup> *Id.*

Accordingly, the appellate court adjudicated the claim of ineffectiveness on direct appeal and reversed for a new trial.<sup>676</sup> Similarly, in *Rios v. State*,<sup>677</sup> defense counsel stipulated that his client qualified as a violent career criminal,<sup>678</sup> which stipulation was read to the jury.<sup>679</sup> In point of fact, the defendant did not qualify as a violent career criminal.<sup>680</sup> The appellate court – noting that it could “conceive of no legitimate strategic purpose for entering into such a highly prejudicial and patently false stipulation”<sup>681</sup> – properly adjudicated the claim of ineffective assistance on direct appeal.<sup>682</sup>

The defendant in *Elmore v. State*<sup>683</sup> was convicted of battery on a law enforcement officer and given an enhanced sentence on that count as a prison releasee re-offender (“PRR”).<sup>684</sup> Battery on a law enforcement officer is not a crime for which a PRR sentence may be imposed, but Mr. Elmore’s trial counsel made no objection to the imposition of this patently illegal

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<sup>676</sup> *Id.* at 707. *See also McComb v. State*, 174 So. 3d 1111 (Fla. 2d DCA 2015).

<sup>677</sup> 730 So. 2d 831 (Fla. 3d DCA 1999).

<sup>678</sup> *See* Fla. Stat. § 775.084(1)(d).

<sup>679</sup> *Rios*, 730 So. 2d at 832.

<sup>680</sup> *Id.*

<sup>681</sup> *Id.* at 832 n. 2.

<sup>682</sup> Examples could be multiplied. *See, e.g., Hills v. State*, 78 So. 3d 648 (Fla. 4th DCA 2012). *But cf. Barnett v. State*, 181 So. 3d 534 (Fla. 1st DCA 2015).

<sup>683</sup> 172 So. 3d 465 (Fla. 1st DCA 2015).

<sup>684</sup> *Elmore*, 172 So. 3d at 466.

sentence.<sup>685</sup> On direct appeal Elmore asserted a claim of ineffective assistance, arguing that the predicate for such a claim – the ineffectiveness is apparent on the record, the prejudice is undeniable, and there can exist no tactical reason for counsel’s conduct – was clearly met.<sup>686</sup> The court, however, declined to reach this issue on direct appeal on the grounds that, “recognizing ineffective assistance of counsel on the face of the record in these circumstances would eviscerate the holding in *Jackson* [*v. State*, 983 So. 2d 562 (Fla. 2008)], which requires preservation even of fundamental errors.”<sup>687</sup> In dissent, Judge Clark makes a telling point: *Jackson* and other authorities upon which the majority relies deal with preservation of sentencing error. Although the error of which Elmore complained happened to occur during the sentencing process, his claim is not one of sentencing error but one of ineffective assistance of counsel.<sup>688</sup>

Prior to the opinion of the Florida Supreme Court in *Steiger v. State*<sup>689</sup> there was no requirement that a claim of ineffective assistance of trial counsel be preserved; indeed such a thing would have been viewed as all but impossible. (“Judge, I make no objection to the imposition of an illegal sentence on my client, but I object to my own ineffectiveness in failing to

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<sup>685</sup> *Id.*

<sup>686</sup> *Id.* at 467.

<sup>687</sup> *Id.*

<sup>688</sup> *Id.* at 468 (Clark, J., dissenting).

<sup>689</sup> 328 So. 3d 926 (Fla. 2021)

object.”)<sup>690</sup> The seeming impossibility of preservation notwithstanding, *Steiger* held that Fla. Stat. § 924.051(3), “which prohibits raising an unpreserved claim of error on direct appeal absent a showing of fundamental error, precludes appellate review of unpreserved claims of ineffective assistance of trial counsel on direct appeal.”<sup>691</sup>

## VI. Other claims commonly asserted under Rule 3.850

“Because there is no procedure for a ‘motion to enforce a plea agreement,’ this claim

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<sup>690</sup> See also discussion *supra* at II C, where this dialogue is imagined:

Defense counsel: Your Honor, now that the jury has retired, I move for mistrial or for a new trial on the grounds of my ineffective assistance of counsel.

The Court: What ineffective assistance?

Defense counsel: Um . . . I’m not really sure . . . I mean, I did my very best, but . . . I want to preserve my client’s claim of ineffective assistance for direct appeal, so on the basis of whatever I did that was ineffective, I move for mistrial or for a new trial.

The Court: Counsel, unless you can identify something that was arguably defective, and that as a consequence of which your client was prejudiced, I don’t see how you’ve preserved anything at all.

Defense counsel: Then . . . then . . . I move for mistrial or for a new trial on the grounds that I’ve rendered ineffective assistance of counsel by failing to preserve my client’s entitlement to a direct appeal on the issue of ineffective assistance of counsel!

<sup>691</sup> *Steiger*, 328 So. 3d at 928.

must be filed pursuant to Rule 3.850.”<sup>692</sup> In *Saye v. State*<sup>693</sup> the defendant entered into a plea agreement pursuant to which he would serve his time in federal custody concurrently with a longer sentence imposed upon him in a federal case. But he was not transported to federal prison, “and as a result, the intent of the plea agreement was frustrated as he will be required to complete his state sentences before being transferred to begin serving his federal sentence.”<sup>694</sup> The terms of the plea agreement being thus breached, Saye was entitled to relief pursuant to Rule 3.850.<sup>695</sup>

#### A. Claims of scoresheet error

A claim of scoresheet error that can be determined from the face of the record is cognizable under Rule 3.850.<sup>696</sup> Such an allegation is an independent, stand-alone claim that has nothing to do with the effectiveness or ineffectiveness of the attorney who represented the defendant at the time the scoresheet was completed and filed.<sup>697</sup> By contrast, a claim of

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<sup>692</sup> *Sweet v. State*, 987 So. 2d 747, 747 (Fla. 2d DCA 2008). *See also State v. Midkiff*, 302 So. 3d 435 (Fla. 5<sup>th</sup> DCA 2020).

<sup>693</sup> 291 So. 3d 118 (Fla. 4<sup>th</sup> DCA 2020).

<sup>694</sup> *Saye*, 291 So. 3d at 119.

<sup>695</sup> *Id.* at 120. *See also Bailey v. State*, 313 So. 3d 749 (Fla. 2d DCA 2020).

<sup>696</sup> *Jackson v. State*, 146 So. 3d 1260, 1261 (Fla. 2d DCA 2014) (citing *Mann v. State*, 974 So. 2d 552, 553 (Fla. 5<sup>th</sup> DCA 2008)).

<sup>697</sup> In *Wright v. State*, 174 So. 3d 400 (Fla. 4<sup>th</sup> DCA 2015), for example, the defendant brought his claim under Rule 3.850(a)(5), alleging not that his trial counsel was ineffective but that his plea was rendered involuntary as a result of an erroneously-calculated scoresheet.

scoresheet error that cannot be determined from the face of the record is cognizable under Rule 3.850 only as an allegation of ineffectiveness of counsel.<sup>698</sup> If a claim of scoresheet error is meritorious, the post-conviction court must re-sentence the defendant unless the record conclusively shows that the same sentence would have been – not could have been, but would have been – imposed using a correct scoresheet.<sup>699</sup>

#### B. Claims for jail credit

Claims for credit for time served in Florida jails must be brought pursuant to Fla. R. Crim. P. 3.801.<sup>700</sup> Claims for credit for time served in out-of-state jails, to the extent that they are cognizable, must be brought pursuant to Fla. R. Crim. P. 3.850.<sup>701</sup>

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<sup>698</sup> *Butdorf v. State*, 150 So. 3d 849, 851 (Fla. 2d DCA 2014) (citing *Lomont v. State*, 506 So. 2d 1141, 1142 (Fla. 2d DCA 1987); *Soto v. State*, 814 So. 2d 533, 533 (Fla. 2d DCA 2002)).

<sup>699</sup> *Brooks v. State*, 969 So. 2d 238 (Fla. 2007); *State v. Anderson*, 905 So. 2d 111, 118 (Fla. 2005); *Blackwell v. State*, 306 So. 3d 412 (Fla. 1<sup>st</sup> DCA 2020); *Sanders v. State*, 285 So. 3d 351 (Fla. 5<sup>th</sup> DCA 2019); *Alexis v. State*, 258 So. 3d 471 (Fla. 4<sup>th</sup> DCA 2018) *Fernandez v. State*, 199 So. 3d 500 (Fla. 2d DCA 2016). Claims of scoresheet error may also in some circumstances be brought under Rule 3.800(a), in which case the applicable standard is whether the same sentence could have been – not necessarily would have been, but could have been – imposed. *Brooks*, 969 So. 2d *passim*, esp. at 239.

<sup>700</sup> *In Re Amendments to the Florida Rules of Criminal Procedure*, 132 So. 3d 734, 737 (Fla. 2013) (Rule 3.801 “governs the correction of a sentence that fails to allow county jail time credit”). See also *Patterson v. State*, 141 So.3d 707 (Fla. 2d DCA 2014); *Gisi v. State*, 135 So. 3d 493, 496 (Fla. 2d DCA 2014) (“Rule 3.801 can be used only to seek jail credit for time spent in Florida jails”).

<sup>701</sup> *Hastings v. State*, 317 So. 3d 279 (Fla. 2d DCA 2021); *Terrell v. State*, 316 So. 3d 434 (Fla. 2d DCA 2021); *Chimale v. State*, 292 So. 3d 1274 (Fla. 1<sup>st</sup> DCA 2020); *Johnson v. State*, 245 So. 3d 1016 (Fla. 1<sup>st</sup> DCA 2018) (citing *West v. State*, 22 So. 3d 797, 798 (Fla. 1<sup>st</sup> DCA 2009)); *Seraphin v. State*, 192 So. 3d 675 (Fla. 2d DCA 2016); *Huff v. State*, 163 So. 3d 1251, 1251-52 (Fla. 5<sup>th</sup> DCA 2015); *DeAngelo v. State*, 141 So. 3d 1269, 1270-71 (Fla. 2d DCA 2015).

A claim for out-of-state jail credit may be raised either on direct appeal or pursuant to Rule 3.850.<sup>702</sup> Presumably a lawyer could render deficient performance by his “failure to preserve [his client’s] entitlement ... for out-of-state jail credit.”<sup>703</sup> Post-conviction applications for out-of-state jail credit are, accordingly, frequently brought as claims of ineffective assistance of counsel.<sup>704</sup> “If a defendant is seeking out-of-state jail credit in a postconviction proceeding, it would appear that the proper method to seek such relief would normally require a timely allegation of ineffective assistance of trial counsel.”<sup>705</sup> There are, however, cases that seem to suggest that a stand-alone claim for out-of-state jail credit – a claim not requiring an allegation of ineffective assistance of trial counsel – is cognizable under Rule 3.850.<sup>706</sup> Perhaps such claims

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2014); *Gisi*, 135 So. 3d at 494.

<sup>702</sup> *Bonilla v. State*, 110 So. 3d 492 (Fla. 4th DCA 2013) (citing *Gomez v. State*, 984 So. 2d 577 (Fla. 4th DCA 2008); *West v. State*, 22 So. 3d 797 (Fla. 1st DCA 2009); *Sambolin v. State*, 2 So. 3d 1097 (Fla. 5th DCA 2009); *Garnett v. State*, 957 So. 2d 32 (Fla. 2d DCA 2007) (en banc)).

<sup>703</sup> *Sabbag v. State*, 141 So. 3d 604, 604 (Fla. 2d DCA 2014). *See also Gisi v. State*, 135 So. 3d 493, 494 (Fla. 2d DCA 2014) (Movant’s “claim of entitlement to out-of-state jail credit ... should have been raised in a timely motion pursuant to Fla. R. Crim. P. 3.850 alleging ineffective assistance of counsel”); *Gomez v. State*, 984 So. 2d 577 (Fla. 4th DCA 2008); *Garnett v. State*, 957 So. 2d 32, 35 (Fla. 2d DCA 2007) (Alternbernd, J.) (“Conceivably, a defendant could argue in a motion filed pursuant to Rule 3.850 that his trial counsel was ineffective for failing to argue and preserve [the] issue [of out-of-state jail credit] for direct appeal”).

<sup>704</sup> *See, e.g., Clark v. State*, 183 So. 3d 467 (Fla. 4<sup>th</sup> DCA 2016); *Brooks v. State*, 91 So.3d 212 (Fla. 4<sup>th</sup> DCA 2012); *Shatley v. State*, 902 So. 2d 349 (Fla. 5<sup>th</sup> DCA 2005); *Fordham v. State*, 853 So. 2d 506 (Fla. 2d DCA 2003).

<sup>705</sup> *Garnett*, 957 So. 2d at 33.

<sup>706</sup> *See, e.g., Seraphin v. State*, 192 So.3d 675, 678 (Fla. 2d DCA 2016) (citing *Currelly v. State*, 801 So. 2d 1000 (Fla. 2d DCA 2001) (claiming that failure to award out-of-state jail

are brought by means of Rule 3.850(a)(6), pursuant to which a claim may be brought under the rule when “[t]he judgment or sentence is otherwise subject to collateral attack.” The cases are less clear than they might be on this point.

The court’s decision to grant or withhold such credit, however, is entirely discretionary. In *Kronz v. State*<sup>707</sup> the Florida Supreme Court held that although a defendant is not entitled as a matter of law to credit for time spent in the jails and prisons of other jurisdictions (even if the defendant was being held solely for rendition to Florida), a:

trial judge does ... have the inherent discretionary authority to award credit for time served in other jurisdictions while awaiting transfer to Florida. In this latter circumstance, the trial judge should consider the appropriateness of an award of credit for time served when the defendant was incarcerated in another state solely because of the Florida offense for which he or she is being sentenced.<sup>708</sup>

Given the discretionary nature of the court’s authority, a post-conviction claimant faces an all-but-insurmountable burden if his application for out-of-state jail credit must be treated as a claim of ineffective assistance of counsel. Even if such a claimant could show deficient

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credit was a violation of the plea agreement)); *Huff v. State*, 163 So. 3d 1251 (Fla. 5th DCA 2015); *DeAngelo v. State*, 141 So. 3d 1269 (Fla. 2d DCA 2014).

<sup>707</sup> 462 So. 2d 450 (Fla. 1985).

<sup>708</sup> *Kronz*, 462 So. 2d at 451. See generally *DeAngelo v. State*, 141 So. 3d 1269 (Fla. 2d DCA 2014); *Brooks v. State*, 91 So. 3d 212 (Fla. 4th DCA 2012); *Palmer v. State*, 67 So. 3d 1178 (Fla. 4th DCA 2011). An exception to the rule of broad judicial discretion is instanced by *Currelly v. State*, 801 So. 2d 1000 (Fla. 2d DCA 2001), in which the plea agreement expressly provided for credit for time served in an out-of-state facility.

performance – even if he could show that his attorney failed to preserve for appellate review the argument that he should receive credit for time spent in a jail in a foreign jurisdiction, and that failure to preserve such an argument constituted an “error[] so serious that counsel was not functioning as the ‘counsel’ guaranteed ... by the Sixth Amendment,”<sup>709</sup> so serious that counsel’s performance was “unreasonable under prevailing professional norms”<sup>710</sup> – he would still be obliged to establish “a reasonable probability that, had counsel sought this credit, the trial court would have abused its discretion in denying it.”<sup>711</sup> Unsurprisingly, “[t]here does not appear to be any case law developing the circumstances that might constitute an abuse of discretion in this situation.”<sup>712</sup> The claimant in *Phillips v. State*<sup>713</sup> alleged the ineffectiveness of his trial counsel in failing to seek credit for time Phillips had served in an Indiana jail. The post-conviction court denied the claim on the grounds that such credit is discretionary and that therefore Phillips could not show prejudice.<sup>714</sup> The appellate court, however, admonished that discretion in this context is “subject to the test of reasonableness.”<sup>715</sup> The post-conviction court must demonstrate that

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<sup>709</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>710</sup> *Valle v. State*, 778 So. 2d 960, 965 (Fla. 2001).

<sup>711</sup> *Gomez v. State*, 984 So. 2d 577, 578 (Fla. 4th DCA 2008). *See also West v. State*, 22 So. 3d 797, 798 (Fla. 1st DCA 2009) (“[E]ven if Appellant’s trial counsel failed to preserve this issue for direct appeal by requesting that the trial court give Appellant credit for the time served in Georgia, counsel could not have been ineffective for failing to do so”).

<sup>712</sup> *Garnett*, 957 So. 2d at 35 n.5.

<sup>713</sup> 229 So. 3d 426 (Fla. 2d DCA 2017).

<sup>714</sup> *Phillips*, 229 So. 3d at 430.

<sup>715</sup> *Id.* at 430 (quoting *Wombaugh v. State*, 25 So.3d 707, 709 n.2 (Fla. 2d DCA 2010)).

reasonable discretion was exercised, either by stating the reasons for its ruling or by attaching some documentation supporting that ruling.<sup>716</sup>

### C. *Brady/Giglio* violations

It is well-settled law that the failure of the prosecution to disclose to the defense evidence favorable to the defense “violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>717</sup> Fla. R. Crim. P. 3.220(b)(4) codifies the prosecution’s *Brady* obligation, providing for disclosure to a criminal defendant of “any material information within the state’s possession or control which tends to negate the guilt of the accused as to the offense charged.” On its face this language is narrower than that of *Brady*, which requires disclosure of favorable evidence material either to guilt *or to punishment*. Rule 3.220(b)(4) is clearly intended, however, to mirror *Brady*. It is intended “to emphasize that constitutionally-protected *Brady* material must be produced regardless of the defendant’s election to participate in the discovery process.”<sup>718</sup>

A defendant’s entitlement to *Brady*-type disclosure is constitutional in nature, grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments. Because a *Brady* violation constitutes a failure of constitutional due process, it is remediable under Rule 3.850(a)(1), as

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<sup>716</sup> *Id.*

<sup>717</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>718</sup> *In Re: Amendment to Fla. R. Crim. P. 3.220 (Discovery)*, 550 So.2d 1097, 1105 (Fla. 1989).

having produced a judgment or sentence “in violation of the Constitution or laws of the United States or the State of Florida.” Thus “an accused’s claim that the state unlawfully suppressed evidence favorable to him in violation of *Brady* ... may be properly considered on motion for post-conviction relief.”<sup>719</sup>

Charles Turner was one of a number of codefendants indicted for kidnaping, robbery, and murder.<sup>720</sup> Long after their convictions became final, Turner and others sought post-conviction relief, alleging the existence of undisclosed *Brady* evidence.<sup>721</sup> This evidence included, for example, interviews with some prosecution witnesses and impeachment information (such as evidence of drug use) as to others.<sup>722</sup> On post-conviction review, the prosecution conceded that the undisclosed evidence was favorable to the accused. But the prosecution took the position that the demised information lacked materiality for *Brady* purposes, in that there was no reasonable probability that, had it been disclosed, the outcome of the trial would have been different.<sup>723</sup> The Court, in a detailed and very fact-specific opinion, agreed, “conclud[ing] that [the evidence] is

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<sup>719</sup> *Ashley v. State*, 433 So.2d 1263, 1270 (Fla. 1983) (citing *Smith v. State*, 400 So. 2d 956 (Fla. 1981)). See also *Lightborne v. Dugger*, 549 So. 2d 1364 (Fla. 1989); *Horn v. State*, 303 So. 3d 1285 (Fla. 1<sup>st</sup> DCA 2020); *Felder v. State*, 198 So. 3d 951 (Fla. 2d DCA 2016). Cases in which the Supreme Court of Florida has given extended consideration to *Brady* issues in 3.850 claims include *Merck v. State*, 260 So. 3d 184 (Fla. 2018); *Thomas v. State*, 260 So. 3d 226 (Fla. 2018); *Hurst v. State*, 18 So. 3d 975 (Fla. 2009); *Smith v. State*, 931 So. 2d 790 (Fla. 2006); *Jennings v. State*, 782 So. 2d 853 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001).

<sup>720</sup> *Turner v. United States*, 582 U.S. \_\_\_, \_\_\_ 137 S.Ct. 1885, 1889 (2017).

<sup>721</sup> *Turner* at \_\_\_, 1891-93.

<sup>722</sup> *Id.* at \_\_\_, 1889-92.

<sup>723</sup> *Id.* at \_\_\_, 1893.

too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards."<sup>724</sup> (*Brady* jurisprudence, particularly to the extent that it addresses materiality, tends to be intensely fact-specific, limiting the ability of one case to serve as precedent for the next.)<sup>725</sup>

Closely akin to *Brady* claims are *Giglio* claims.<sup>726</sup> The post-conviction movant asserting a *Giglio* claim must establish that testimony given at his trial was false; that the prosecution knew that the testimony was false; and that the false testimony was material.<sup>727</sup> In *Guzman* both the prosecution witness Martha Cronin and the lead detective testified that Cronin received no benefit for her testimony against Guzman.<sup>728</sup> But in truth Cronin had been paid \$500, "a significant sum to an admitted crack cocaine addict and prostitute."<sup>729</sup> The second element of *Giglio* – that the prosecution knew the demised testimony was false – is met "because the knowledge of the detective who paid the ... money to Cronin is imputed to the prosecutor who

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<sup>724</sup> *Id.* at \_\_\_, 1886, 1894-95. Justice Kagan, dissenting for herself and Justice Ginsburg, agreed with the majority's rehearsal of the applicable law, but concluded that the evidence in question was sufficiently probative to have met the *Brady* standard – in other words, that there was a reasonable probability that, had the demised evidence been disclosed, the outcome of the trial would have been different. *Id.* at \_\_\_, 1897-99 (Kagan, J., dissenting). See also *Smith v. State*, 235 So. 3d 265 (Fla. 2017).

<sup>725</sup> But cf. *Simpson v. State*, \_\_\_ So. 3d \_\_\_ (Fla. Jan. 13, 2022) (failure to identify witness's status as confidential informant was material for purposes of *Brady*) (citing *Gorham v. State*, 597 So. 2d 782 (Fla. 1992)).

<sup>726</sup> From the eponymous *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>727</sup> *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003) (citing *Ventura v. State*, 794 So. 2d 553, 562 (Fla. 2001)). See also *Dailey v. State*, 329 So. 3d 1280 (Fla. 2021).

<sup>728</sup> *Guzman*, 868 So. 2d at 505.

<sup>729</sup> *Id.*

tried the case.”<sup>730</sup>

The third element of a *Giglio* violation is materiality. The materiality standard under *Giglio* is easier for the post-conviction claimant to meet than the materiality standard under *Brady*. For *Brady* purposes, evidence is material if there is a reasonable probability that, had it been disclosed to the defense, the outcome would have been different. A reasonable probability is a probability sufficient to undermine confidence in the verdict.<sup>731</sup> Under *Giglio*, however, if a prosecutor knowingly uses perjured testimony or fails to correct what he later learns to be perjured testimony, such testimony is material if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.<sup>732</sup>

## VII. Form of the order

If an evidentiary hearing was conducted, the court’s order must make written findings of fact and law.<sup>733</sup> All orders denying relief under Rule 3.850 must include language informing the

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<sup>730</sup> *Id.* (citing *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992)). *NB* that the statement in question must be false, not merely ambiguous. “Ambiguous testimony does not constitute false testimony for the purposes of *Giglio*.” *Phillips v. State*, 608 So. 2d 778, 781 (Fla. 1992).

<sup>731</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985). *See Cardona v. State*, 826 So. 2d 968 (Fla. 2002).

<sup>732</sup> *United States v. Agurs*, 427 U.S. 97, 103 (1976); *State v. Dougan*, 202 So. 3d 363, 378 (Fla. 2016) (“[O]nce the defendant establishes that the State knowingly presented false testimony, the burden is on the State to prove beyond a reasonable doubt that the knowing use of the false testimony, or failure to disclose the false testimony once it was discovered, did not affect the verdict”).

<sup>733</sup> Fla.R.Crim.P. 3.850(f)(8)(A); *White v. State*, 198 So. 3d 1130 (Fla. 4<sup>th</sup> DCA 2016).

movant that he has 30 days in which to appeal. The order should also identify the record documents that should be transmitted with any appeal. All non-final, non-appealable orders should inform the movant that no appeal will lie until a final order is entered.<sup>734</sup>

Subsection (j) of Rule 3.850 provides for motions for rehearing, but such motions are disfavored. They are not needed to preserve any issue for appellate review, and are appropriate only when the movant has a “good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court’s ruling.”<sup>735</sup> A motion for rehearing must be filed within 15 days of the date of service of the order as to which rehearing is sought.<sup>736</sup>

A defendant can appeal the denial of a 3.850 claim. So, too, can the prosecution appeal the grant of such a claim.<sup>737</sup>

## VIII. Sanctions

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<sup>734</sup> See Fla. Crim. P. 3.850(f)(4).

<sup>735</sup> Fla. R. Crim. P. 3.850(j). Motions by the prosecution for rehearing are, for most purposes, governed by Fla. R. Crim. P. 3.192; but that rule by its terms does “not apply to post-conviction proceedings pursuant to Rule 3.800(a), 3.801, 3.850, 3.851, or 3.853.” See *In Re: Amendments to Florida Rule of Criminal Procedure 3.192*, 229 So. 3d 1116 (Fla. 2017) (“Florida Rule of Criminal Procedure 3.192 pertains to motions for rehearing in non-postconviction relief cases”).

<sup>736</sup> *Id.* See *gen’ly Long v. State*, 177 So. 3d 89 (Fla. 2d DCA 2015).

<sup>737</sup> Fla. R. App. P. 9.140( c)(1)(J) (prosecution may appeal an order granting relief under Rules 3.801, 3.850, 3.851, or 3.853).

Chorus: Did you perhaps go further than you have told us?

Prometheus: I caused mortals to cease foreseeing doom.

Chorus: What cure did you provide them with against that sickness?

Prometheus: I placed them in blind hopes.

– Aeschylus, *Prometheus Bound*<sup>738</sup>

When the court determines that a *pro se* motion filed under Rule 3.850 is frivolous, malicious, filed in bad faith, or is an abuse of process (as, for example, with successive motions)<sup>739</sup>, the court has power to protect itself from continued unwarranted demands for judicial time and attention.<sup>740</sup> But care must be taken to see to it that the post-conviction

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<sup>738</sup> See also *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) (“It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search”).

<sup>739</sup> But a “claim need not be repetitive for it to be frivolous or an abuse of the judicial process.” *Flowers v. State*, 278 So. 3d 899, 902 (Fla. 1<sup>st</sup> DCA 2019) (citing *Carter v. State*, 82 So. 3d 1069, 1071 (Fla. 4<sup>th</sup> DCA 2011); *Johnson v. State*, 44 So. 3d 198, 200 (Fla. 4<sup>th</sup> DCA 2010) (“Untimely post-conviction challenges, which do not establish an exception to the two-year time limit, are abusive and sanctionable”). “Nor is there any ‘fixed number of filings that constitute an abuse of process’.” *Flowers*, 278 So. 3d at 902-03, quoting *Dennis v. State*, 685 So. 2d 1373, 1374-75 (Fla. 3d DCA 1996).

<sup>740</sup> “A court has the inherent authority to limit abuses of the judicial process by *pro se* litigants whose frivolous or excessive filings interfere with the timely administration of justice.” *Flowers*, 278 So. 3d at 902 (citing *Rivera v. State*, 728 So. 2d 1165, 1166 (Fla. 1998)).

claimant is given fair warning of what lies ahead.<sup>741</sup> As a first step, the court should enter a “finger-wagging” order: an order informing the claimant that his practices will not continue to be tolerated, and that if they are not curtailed, sanctions will follow.<sup>742</sup> If that fails, the court may issue an order directing the movant to show cause why specifically-identified sanctions should not be imposed.<sup>743</sup> If the movant fails to show good cause, the court may assess costs; bar the

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<sup>741</sup> “A court must provide an inmate with notice of the sanctions it intends to impose and an opportunity to respond before it prohibits any further *pro se* filings.” *Flowers*, 278 So. 3d at 902 (citing *Toliver v. Crews*, 146 So. 3d 64, 65 (Fla. 1<sup>st</sup> DCA 2014)). “Conversely, a court can refer an inmate to the [Department of Corrections] for disciplinary proceedings under section 944.279 based on frivolous court filings without giving him notice or an opportunity to respond.” *Flowers*, *id.* (citing *Ponton v. Willis*, 172 So. 3d 574, 576-77 (Fla. 1<sup>st</sup> DCA 2015)).

<sup>742</sup> An order denying relief may conclude with language such as the following:

Mr. Acevedo is also cautioned that his right to file pleadings and papers in the above-styled case is in serious jeopardy. Since receiving the sentences he seeks to vacate, Mr. Acevedo has filed no fewer than four pleadings, including the motion at bar. As noted by Chief Justice Warren Burger, “the judicial system [is not] a laboratory where small boys can play.” *Clark v. Florida*, 475 U.S. 1134, 1136 (1986). A post-conviction claimant’s right to file papers in his cases is not absolute. Abusing the justice system by filing frivolous motions is sanctionable. Possible sanctions include the forfeiture of gain time earned in prison.

<sup>743</sup> Fla. R. Crim. P. 3.850(n)(3); *Johnson v. State*, 321 So. 3d 853 (Fla. 1<sup>st</sup> DCA 2021). An order directing the claimant to show cause may conclude with language such as the following:

“The post-conviction process does not exist simply to give [defendants] something to do in order to pass the time as they serve their sentences.” *Carroll v. State*, 192 So. 3d 525, 526 (Fla. 1<sup>st</sup> DCA 2015). There is more at issue here than the minor annoyance and inconvenience involved in disposing of \_\_\_\_\_’s frivolous pleadings. As the haystack of post-conviction pleadings filed by or on behalf of Florida prisoners burgeons, so too does the difficulty of finding the needle of a meritorious claim.

The Florida Supreme Court has observed: One justification for sanctioning an abusive litigant “lies in the protection of the rights of others to have the Court conduct timely reviews of their legitimate filings.” *Pettyway v. McNeil*, 987 So. 2d 20, 22 (Fla. 2008). There comes a point

movant from filing further post-conviction pleadings in the case unless signed by a member in good standing of the Florida Bar; and send a certified copy of the court's order to the institution at which the movant is housed for the imposition of such sanctions as that institution's authorities deem appropriate.<sup>744</sup> The court may refer the matter to the Office of the State

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where "enough is enough." *Carroll*, 192 So. 3d at 526. The court's resources are finite, and every minute spent on entertaining meritless post-conviction motions is time that cannot be spent on potentially meritorious cases. \_\_\_\_\_ has abused the judicial system by filing the motion at bar.

\_\_\_\_\_ is hereby directed to SHOW CAUSE, within 30 days of the entry of this order, why he should not be barred from filing further pleadings or papers pertaining or relating to, or arising out of, the present case.

<sup>744</sup> Fla. R. Crim. P. 3.850(n)(4). *See, e.g., Oquendo v. State*, 2 So. 3d 101 (Fla. 4th DCA 2008). In *Dickerson v. State*, 330 So. 3d 587, 588 (Fla. 5<sup>th</sup> DCA 2021), the appellate court reminded post-conviction courts that, "Only [the Department of Corrections] is responsible for calculating and awarding credit for time served after imposition of a sentence, not a [post-conviction] court. . . . Lower courts are permitted to recommend [that the Department of Corrections] institute disciplinary proceedings, provided they do not order [the Department of Corrections] to take any explicit action."

A barring order may conclude with language such as the following:

On Nov. 17, 2017, I entered an order directing Mr. Lopez to show cause within 30 days as to why he should not be barred from filing additional pleadings or papers pertaining or relating to, or arising out of, the case at bar. Mr. Lopez has failed to do so. In response, he has filed yet another of his utterly fatuous pleadings, which serves only to underscore the need for an order bringing an end to his continuous abusive practices.

Accordingly, it is hereby ORDERED AND ADJUDGED that:

Mr. Lopez is prohibited from filing future pleadings or documents of any kind before this court pertaining or relating to, or arising out of, the case at bar, unless signed by a member in good standing of the Florida Bar. *See State v. Spencer*, 751 So. 2d 47, 48 (Fla. 1999).

The Clerk of Court is directed to accept no further pleadings herein from Mr. Lopez. If such filings are received, they shall be returned to Mr. Lopez with a reference to this order. *See Sykes v. State*, 6 So. 3d 1246, 1246 (Fla. 1<sup>st</sup> DCA 2009).

Attorney for the commencement of perjury proceedings.<sup>745</sup>

A more vexing problem is the imposition of sanctions when frivolous post-conviction motions are brought and litigated, not by *pro se* litigants, but by members of the Bar.<sup>746</sup> Fla.

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The Clerk of Court is further directed to forward a copy of this order to the Department of Corrections for consideration by that department of disciplinary measures against Mr. Lopez pursuant to Fla. Stat. §§ 994.279(1) and 994.28(2)(a). *See Pettyway v. McNeil*, 987 So. 2d 20, 23 (Fla. 2008).

<sup>745</sup> Fla. R. Crim. P. 3.850(n)(5). *See also* Fla. Stat. § 914.13, which provides:

When a court of record has reason to believe that a witness or party who has been legally sworn and examined or has made an affidavit in a proceeding has committed perjury, the court may immediately commit the person or take a recognizance with sureties for the person's appearance to answer the charge of perjury. Witnesses who are present may be recognized to the proper court, and the state attorney shall be given notice of the proceedings.

The first sentence of the statute instructs trial judges that, when confronted with perjury, they “may” – but need not – “immediately commit” the perjurer. The command of the second sentence, however, is mandatory, not precatory: “the state attorney *shall* be given notice” of the perjury. (Emphasis added.) Thus the statute contemplates a summary perjury proceeding: the court can, on its own initiative, jail a witness on the spot. Florida judges, however, have, in a wise exercise of their discretion, seldom used the power vested in them by this statute. *See, e.g., Henderson v. Wainwright*, 300 So. 2d 274, 274 (Fla. 2d DCA 1974) (“We acknowledge that we have the power to punish [summarily pursuant to § 914.13], but in a case this serious we refrain from doing so and will, in lieu of [doing so], advise the State Attorney ... of the evidence tending to show the” perjurious conduct).

<sup>746</sup> Yet another variation on the theme arose in *Solorio v. State*, 194 So. 3d 465 (Fla. 3d DCA 2016). There the post-conviction motion was authored neither by the movant nor by a lawyer, “but by Donyeal McCray D.C. #248624 ‘as next of friend.’ ... The reader of this order will not be surprised to learn that Mr. McCray is neither a licensed member of the Florida Bar nor an alumnus of any accredited law school. He is what is commonly referred to as a ‘jailhouse lawyer’.” *Solorio*, 194 So. 3d at 467. The post-conviction court referred Mr. McCray’s conduct to the Florida Bar, which referral the appellate court adopted with approval. *Id.*

Stat. § 57.105(1)(a) provides that a trial (or, presumably, a post-conviction) court can impose sanctions on an attorney upon its own initiative.<sup>747</sup> The purpose of § 57.105 is to discourage baseless claims by placing a price tag on the making of such claims.<sup>748</sup> Under § 57.105, “a trial court must find that the action is so clearly devoid of merit both on the facts and the law as to be completely untenable.”<sup>749</sup> The twenty-one-day safe harbor provision required when an opposing party moves for sanctions does not apply to court-initiated sanctions.<sup>750</sup> Pursuant to *Santini v. Cleveland Clinic of Florida*,<sup>751</sup> a trial court can impose sanctions on an attorney when the trial court: makes an express finding of bad faith; supports the sanctions with detailed factual findings describing the specific acts of bad-faith conduct that resulted in the unnecessary incurrence of attorney’s fees; fixes the amount of the award in a manner directly related to the attorneys’ fees and costs that the opposing party has incurred as a result of the specific act of bad faith; has given the attorney being sanctioned notice and an opportunity to present witnesses and other evidence; and relied on the applicable rule or statute rather than on

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<sup>747</sup> See Fla. Stat. § 57.105(1)(a) (2013) (“Upon the court’s initiative . . . the court shall award a reasonable attorney’s fee . . . [where the attorney] knew or should have known that a claim or defense when initially presented to the Court was not supported by material facts necessary to establish the claim or defense[.]”).

<sup>748</sup> *Whitten v. Progressive Casualty Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982).

<sup>749</sup> *Whitten*, 410 So. 2d at 505 (quoting *Allen v. Estate of Dutton*, 384 So. 2d 171, 175 (Fla. 4<sup>th</sup> DCA 1980)).

<sup>750</sup> See *Koch v. Koch*, 47 So. 3d 320, 324–25 (Fla. 2d DCA 2010).

<sup>751</sup> 65 So. 3d 22, 38 (4<sup>th</sup> DCA 2011).

inherent authority.<sup>752</sup>

But § 57.105 is likely the wrong vehicle for the imposition of sanctions in connection with meritless claims under Rule 3.850. The problem is not that § 57.105 is intended for use in civil cases; proceedings pursuant to Rule 3.850 (however captioned by the authors of the motions giving rise to those proceedings) *are* civil in nature, conducted in criminal court pursuant to the court's ancillary jurisdiction.<sup>753</sup> The problem is that § 57.105 is intended to make innocent lawyers and litigants whole when the bad faith and unprofessionalism of their adversaries has

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<sup>752</sup> *Santini*, 65 So. 3d at 38.

<sup>753</sup> *State v. Weeks*, 166 So. 2d 892, 894-95 (Fla. 1964):

To meet the impact of *Gideon* [*v. Wainwright*, 372 U.S. 335 (1963)] this Court on April 1, 1963, promulgated its Criminal Procedure Rule 1. ... Rule 1 is simply a Florida adaptation of Title 28, Section 2255, U.S.C.A.

...

In administering relief ... under Title 28, Section 2255 ... the federal courts have consistently drawn a distinction between the original criminal proceeding and the post-conviction collateral remedy. ... The federal courts have held that ... proceedings under 2255 ... are not steps in a criminal prosecution. On the contrary, they are in the nature of independent, collateral civil actions which are not clothed with the aspects of a “criminal prosecution” under the Sixth Amendment. In view of the admitted similarity between our Rule 1 and Section 2255, we feel justified in applying the federal precedents to the situation at hand. This is so even though our Rule is designated for convenience as Criminal Procedure Rule 1.

*See also id.* at 893 (“A proceeding under Rule 1 is civil in nature”). *But cf. McGee v. State*, 935 So. 2d 62 (Fla. 1<sup>st</sup> DCA 2006).

obliged them to engage in litigation they should never have been obliged to engage in, and to incur expenses they should never have been obliged to incur. Thus the requirement of *Santini* that a court, in imposing sanctions under § 57.105, fix the amount of the sanction based upon the attorneys' fees and costs that the victimized party has incurred. Typically in post-conviction proceedings the adverse party – the Office of the State Attorney – has incurred no costs at all. True, the post-conviction court is victimized when its time is squandered adjudicating a motion that should never have been filed. More importantly, a post-conviction claimant is victimized when a lawyer has fed him a diet of false hope, and has charged real money for it.

Such a lawyer should be made to disgorge all fees and other consideration that he has obtained from such a client. It is not necessarily clear, however, that the court has power to order such disgorgement.<sup>754</sup> Perhaps such attorney misconduct is best dealt with by the court's referral to the appropriate instrumentality of the Florida Bar.

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<sup>754</sup> *Cf. Moakley v. Smallwood*, 826 So. 2d 221, 222 *et. seq.* (Fla. 2002) with *Moakley*, 826 So. 2d at 227 *et. seq.* (Wells, J., concurring).

